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From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law

DR. RANEE KHOOSHIE LAL PANJABI*

I. INTRODUCTION

In just seven years our planet Earth will enter a new century. Whether or not it survives the next hundred years will depend largely on the effectiveness of international and national efforts in the next few years. The depletion of the ozone layer protecting the planetary environment, the befouling of air, the pollution of water, the erosion of soil, the destruction of forests, the contamination of the oceans—these are but a few of the host of environmental problems which have to be tackled urgently if the planet is to continue to provide a haven for our species and for all the other millions of life forms whose existence is imperilled by the activities of Man. There is now a terrifying realization among millions of environmentally conscious people around the world that these problems are so vast, overwhelming and pervasive that governments may not be able to act in time to restore the Earth, to save the world for future generations.

Fortunately, the growing environmental awareness and recognition of the urgency of the problem has generated a determination in thousands of people world-wide to undertake this task. Never has humanity faced greater obstacles or been more challenged to come up with adequate solutions. Yet never have so many people of different races, religions and ways of life been prepared to face the challenge as they now appear to be.

There can be little doubt that environmentalism is the major political, economic and social issue of the 1990's. This cause commands the type of grass-roots support around the planet which few other ideas have evoked in the long history of Mankind. Environmentalism has achieved the status of a philosophy few would dare to question or oppose. It may

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well become the primary ideology of the post-Cold War world. If governments can respond adequately to the demands of their people, the human species may yet be able to salvage the only viable home it has. The problem lies not in the acceptance of environmental concerns but in the implementation of environmentalists' programs for clean-up. A planet facing debilitating recession in its richest nations and grinding poverty in its poorest cannot yield the resources and the funds to clean up the environment. An emphasis on short-term necessity may push aside the long-term interest which dictates that the Earth must be cleansed of its foul air and water if the human species is to survive.

The global concern about the problems of the environment has evoked two major world conferences in the past two decades. The first was held at Stockholm, Sweden in 1972; the second, in June, 1992 at Rio de Janeiro, Brazil. These two conferences have been successful in generating global concern about environmental deterioration but have not yet resulted in action to match the level of international awareness and concern. The problem is that rhetoric about the environment is far easier to produce than action, and international forums tend on occasion to degenerate into "rhetoric-fests," where world leaders spout all the proper phrases but then go home and often fail to implement their internationally-formulated promises.

Because environmentalism has now become a political issue, it has fallen prey to the vicissitudes of political expediency and is often a victim of the fact that democratic governments—those most attuned to environmental awareness—are often short-lived and subject to electoral changes. Thus, the very situation which encourages free choice in democracies appears to militate against the implementation of long-term solutions of clean-up which alone can save the planet. This is why it is so important to raise environmentalism above the level of party politics and make it an issue of national and international significance, not only in terms of promise and commitment but in terms of action and implementation. The numerous nations which participated in the United Nations Conference on the Human Environment in Stockholm and the United Nations Conference on the Environment and Development (UNCED) in Rio were aware of the chasm between rhetoric and real action which is an inevitable aspect of environmentalism. It was assumed at both conferences that the creation of blueprints of principle would emphasize the significance of environmental concern. The acceptance by all nations of a body of principles could form an initial step to encourage not merely national measures to curb pollution but international treaties to alleviate the global environment. Both conferences paid particular attention to the formulation of these principles which were to guide and chart a path for Mankind. The Stockholm Conference produced the Declaration of the United Nations Conference on the Human Environment, which consists of a preamble and twenty-six principles. The recent conference at Rio resulted in acceptance of the Rio Declaration on Environment and Development, which has a brief preamble and twenty-seven principles.

This article will attempt to provide an in-depth comparison of these two international documents with a view to discerning the significance of each and the differences in emphasis in the two decades from the 1970's to the 1990's as demonstrated in these instruments. As the Rio Declaration specifies the significant directions for the next few years, the emphasis will be on this instrument of international endeavor. World opinion on the priorities, successes and weaknesses of the Rio Declaration is relevant to a full understanding of its significance. It must be pointed out that length constraints limit the degree to which every aspect of the comparison can be explored. Nor can every principle in each declaration be analyzed. That project would require a book in terms of length. The focus will be on the Rio Declaration as it stands and not on the process by which it was created.

Although both international conferences produced other instruments for acceptance and signature,[1] the formulation of bodies of principles was significant in establishing the fact that environmentalism is not merely an issue of political and economic concern. The Stockholm and Rio Declarations have brought a new dimension to the tone of environmentalism by generating an awareness that these issues over-ride the more mundane considerations which prompt ordinary political action. The declarations signify a universal acceptance of and acquiescence in the primary, fundamental fact that environmentalism is a matter of values. It may not be too early to call it the new ethic of the 1990's. Inspired by the pain of millions who suffer daily from the effects of environmental pollution, the declarations serve to remind the leaders of the planet both about the seriousness of the problem and about the need for dramatic measures to alleviate the lot of those who have been victimized. Even though both declarations fall short of reflecting the moral authority which initially inspired them, they form a useful charter and benchmark for future direction.

Although cynics may argue that such pronouncements of principle are hopelessly naive, an exercise in futility, more honored in the breach than in the observance, the very fact that so many nations could after intense deliberation formulate these principles is indicative of the universality of awareness concerning the many facets of the environmental problem. The skepticism of those who witnessed the non-implementation of most of the Stockholm principles is akin to the pessimism of those who

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1. The Stockholm Conference resulted in *Action Plan for the Human Environment* and resolutions on World Environment Day, Nuclear Weapons Tests and the Convening of a Second Conference on the Human Environment. *See* U.N. Doc. A/CONF. 48/14 (1972).

The delegates attending the 1992 Rio Earth Summit, as it was popularly called, accepted the massive detailed formulation of specific environmental plans called Agenda 21, agreed to a non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests (*see* U.N. Doc. A/CONF.151/6/Rev.1, June 13, 1992), signed the *United Nations Framework Convention on Climate Change* (*see* U.N. Doc. A/AC.237/18 (Part II/Add.1)), and the more controversial *Convention on Biological Diversity*, 31 I.L.M. 818, 822 (1992), which the Government of the United States of America refused to sign.

daily decry the fact that Mankind appears not to heed or follow the teachings of the great religious leaders. However, few of those who lament the religious deficiencies of modern citizens would be in favour of discarding the great body of religion and philosophy that has been produced for the benefit of Mankind. Similarly, the inadequate implementation of environmental principles ought not to daunt or deter us from realizing their inherent significance and relevance.

An emphasis on legal principle can be very useful in the international realm where there is yet no supra-national sovereign power to control states. While acknowledging that nation states are still in a virtual state of nature with respect to the exercise of power, few would dispute the fact that international law daily erodes the realm of that natural sovereignty and circumscribes it with treaties, trade agreements, United Nations resolutions and a plethora of good faith accords. William Thorsell has written about the "erosion of sovereignty that has been accelerating since the 1970's."[2] Iraq learned the hard way that unilateral aggression simply does not pay when its invasion of Kuwait was challenged by international military intervention. States which choose to behave like renegades risk being treated as pariahs. The people of Iraq continue (at time of writing) to suffer the consequences of the actions of their dictator Saddam Hussein. By a curious twist of fate, it was left to Saddam Hussein—the present champion of irresponsible national sovereignty—to demonstrate the importance and dire necessity for an international approach to environmental concerns. By flooding the Persian Gulf with oil and by blowing up over seven hundred Kuwaiti oil wells[3]—an act which befouled the air all the way to India—he demonstrated the international impact of ecoterrorism and underscored the need for universal measures to save the planet. If governments are not yet willing to surrender their sovereign powers for the environmental benefit of all inhabitants of this planet, it is imperative that at the very least they be reminded constantly both of their obligations and of their responsibilities in this regard. A short body of easily comprehensible principles serves a useful purpose as an environmental beacon guiding nations and their citizens toward greater environmental awareness. Hopefully, the realization of the dimensions of the problem will generate further efforts to practice environmental protection.

Nationalism is today the single largest obstacle to global environmentalism. The "us" against "them" mentality generated by nationalism breeds a reliance on narrow perspectives based on self-interest and the immediate expedient requirements of a sovereign state. The international outlook, on the other hand, favors a long-term, less self-centered approach. The problem is that while environmental agreements are internationally formulated, they have to be nationally implemented. Hence, what should be achieved with universal benefit in view is often subsumed to

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2. William Thorsell, *A New Chapter in the Decline and Fall of National Sovereignty*, GLOBE AND MAIL (Toronto), Dec. 26, 1992, at D6.

3. *Hatred*, NEWSWEEK, June 1, 1992, at 31.

the self-interest of the sovereign state. The fact is that today, despite the plethora of international agreements, treaties and the existence of the United Nations and its numerous bodies, sovereign states are still essentially in a state of nature with respect to their relations with each other. This unfortunate reality makes decisive action in the environmental field extremely difficult. Given the existence of so many nations on this planet, the best that one can hope for is that many of them will be inspired by their own environmental rhetoric and by their international commitments to take the necessary steps to clean up their own area of the planet. The principles of environmentalism may be formulated on the large international stage. Regrettably, the materialization of these principles takes place in the narrower national sphere. Therein lies the biggest obstacle and the greatest challenge for environmentalists.

Another facet of the problem was explained by Frances Cairncross writing in *The Economist*:

> Nature is no respecter of national boundaries. Across those dotted lines on the globe, winds blow, rivers flow and migrating species walk or fly. The dotted lines may carve up the earth, but the sea and the atmosphere remain open to all, to cherish or plunder. When people in one country harm that bit of the environment they assume to be theirs, many others may suffer, too. But how, and how much, can countries make their neighbours change their ways?[4]

The limitations of the present political structure of the planet with its multitude of small, medium and large nation states certainly slows the pace of environmental activity. The vast disparity of resources, wealth and population between these many states adds to the problem. But as Maurice Strong, Secretary-General of UNCED commented:

> We do not have a central world government, and if we are going to insist that you set up a central world government and a central world gendarmerie before you deal with environment problems, the planet will be dead. We have to work with the system we've got, which is nation states working together through the United Nations, which is the only global organization that can perform that function.[5]

The World Commission on Environment and Development proposed in its report, *Our Common Future*, that:

> Building on the 1972 Stockholm Declaration . . . there is now a need to consolidate and extend relevant legal principles in a new charter to guide state behaviour in the transition to sustainable development . . . . The charter should prescribe new norms for state and interstate behaviour needed to maintain livelihoods and life on our shared planet,

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4. Frances Cairncross, *The Environment: Whose World Is It, Anyway?*, ECONOMIST, May 30, 1991, at 5.

5. *Leader of Rio Conference Predicts Success*, CHRISTIAN SCI. MONITOR, May 29, 1992, at 3 (an interview of Maurice Strong, Secretary General of the United Nations Conference on Environment and Development).

> including basic norms for prior notification, consultation, and assessment of activities likely to have an impact on neighbouring states or global commons.[6]

The call to create new normative structures was timely and valid. However, the implementation of this challenge would not be easy. Dennis Lloyd commented: "Law . . . cannot but be a reflection—however partial and imperfect—of the society in which it operates, and if that society contains inherent contradictions these will be manifested in the fabric of the law itself."[7] Prior to the publication of *Our Common Future*, the United Nations General Assembly had accepted the World Charter for Nature in 1982.[8] The World Charter for Nature and the Stockholm Declaration have been appropriately called "decennial touchstones in the area" of international environmental law.[9]

Ten years after the World Charter for Nature and five years after the initial publication of *Our Common Future*, the task of creating a body of principles of international environmental law was still formidable, given the diversity of interests, both national and regional which sought representation for particular points of view. The environmentally conscious developed world envisaged an Earth Charter which in Howard Mann's opinion "would be readable, understandable and accessible to everyone, (i.e., a document that was not a typical U.N. resolution) but [that] would provide an important tool for the shaping of public opinion on, and support for, the concept of sustainable development."[10] According to A.O. Adede, during the pre-UNCED process, the United Nations Working Group's priorities were to make the principles short and concise, with an inspiring and appealing text which would be "easily understood by the general public."[11] If both the Stockholm and Rio Declarations appear less than perfect in terms of their inspirational value, it could equally be suggested that they at least address the primary concerns of the majority of governments represented at the two environmental conferences. Although the Stockholm and Rio Declarations have not been categorized as legally binding, their acceptance at both conferences was by no means easy. The discussions and debates over principle drew forth the full panoply of argument on the North-South divergence, the developed versus developing conflict and the rich nations against the poor nations. That so much thundering rhetoric accompanied the formulation of declarations never meant to be legally binding indicates that delegates at both Conferences

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6. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 332 (1989).

7. DENNIS LLOYD, THE IDEA OF LAW 225 (1985).

8. The vote was 111-1 in favor of passage. *See* G.A. Res. 37, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1983).

9. Howard Mann, *The Rio Declaration*, 86 PROC. A.S.I.L. 406 (John Lawrence Hargrove ed., 1992).

10. *Id.* at 409.

11. A.O. Adede, *International Environmental Law from Stockholm to Rio—an Overview of Past Lessons and Future Challenges*, 22 ENVTL. POL'Y & L. 88, 100 (1992).

were keenly aware of the ultimate significance of creating a body of environmental principles. Principle can be the precursor of law, provided it evokes sufficient public support and generates a type of moral authority of its own. A body of international legal principles can also, over the course of time, be assumed by some of its proponents to be acceptable as customary law.[12] Even though the Stockholm and Rio Declarations may not bind nations in the legal sense, they do oblige them morally to respect the ideas as indicators of a universal consensus about the priorities of environmentalism. Representing Thailand at UNCED, Dr. Chulabhorn Mahidol reminded delegates that the Rio Declaration would "have a very strong political and moral force."[13]

The differing priorities of the developed world for environmentalism and the developing world for development were reflected in the long and rather bitter debates which resulted in the rather choppy and less than inspirational text of the Rio Declaration.

> The original idea among the developed countries was to produce a ringing declaration in Rio which 'kids all over the world could hang on their bedroom walls.' But then the developing countries rather unhelpfully pointed out that many of the children in their part of the world don't have bedrooms.[14]

The proposed Earth Charter became "a graphic symbol of the North-South divide,"[15] and was converted into a more pedestrian, rather wordy declaration which the world accepted with a somewhat resigned sense of inevitability. Bowing to the inescapable force of international political reality, the head of the Canadian delegation and Personal Representative of the Canadian Prime Minister at Rio, Arthur Campeau described the final declaration as "a document suitable for bureaucrats."[16]

The delegates even argued at Rio about the status of the Rio Declaration. The United States was in favor of placing the body of principles as a preamble to the detailed Agenda 21 document.[17] As Agenda 21 is also not legally-binding, this idea would appear to have some logic. However, Agenda 21 is also unlikely to be read widely or perused by the general public. It has been criticized as a "750-page document of unsurpassed UN verbosity, intended to be the world's work programme for sustainable de-

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12. For a perception of the Stockholm Declaration's customary law status see Mann, *supra* note 9, at 405-14.

13. Professor Dr. Her Royal Highness Princess Chulabhorn Mahidol, Personal Representative of the King of Thailand, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

14. Frank McDonald, *If This is Progress, We're in Deep Trouble*, IRISH TIMES, June 11, 1992, at 7.

15. Lucia Mouat, *Earth Summit in Rio Faces Complex Issues*, CHRISTIAN SCI. MONITOR, Mar. 27, 1992, at 7.

16. Geoffrey York & James Rusk, *PM Urges Action to Save Species*, GLOBE AND MAIL (Toronto), June 2, 1992, at A3.

17. Lucia Mouat, *Small Steps to Saving the Planet*, CHRISTIAN SCI. MONITOR, Mar. 12, 1992, at 3.

velopment."[18] Attaching the Rio Declaration to Agenda 21 might well have ensured its consignment to oblivion in future years. The independent status of the Declaration guarantees it a wider audience. It has also been suggested that this status gives it "the effect of what many describe as 'soft law.' "[19]

The Stockholm Conference had raised public awareness about our ailing planet, and the Rio Summit extended this interest worldwide as television and radio carried its message to the far ends of the earth. The Stockholm Conference attracted only two heads of government, Indian Prime Minister Indira Gandhi and Swedish Prime Minister Olaf Palme.[20] The Earth Summit at Rio drew over one hundred heads of state and government.[21] Dr. Michael Oppenheimer of the Environmental Defense Fund explained that "[y]ou can't be treated as a world leader on any issue without being a player on the environment."[22] As Brad Knickerbocker commented in *The Christian Science Monitor*, "[s]ince the last gathering convened 20 years ago, both the seriousness of global environmental problems and general awareness about them have increased dramatically, as has the level of human suffering due to related poverty."[23] In 1972, the U.S.S.R. and its Eastern European allies boycotted the Stockholm Conference because the German Democratic Republic could not participate equally with other member nations.[24] At Rio there was more global participation both at the governmental and non-governmental level, reflecting the seriousness of environmental degradation and possibly also illustrating the effectiveness of the Stockholm Conference in heightening international awareness of the problem.

The following comparison of the two documents of principle[25] will include quotations in italics from both with appropriate references. The clauses of the two documents have been grouped on the basis of subheadings which explain the essential subject matter of the various principles. Those portions of the principles which are relevant to the theme of the sub-heading will be quoted. Occasionally, an important principle may be repeated as it may require analysis under different sub-headings. It was felt that this method of proceeding was preferable to following one or other document seriatim in view of the fact that the two documents

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18. *Bargain Not a Whinge*, TIMES (London), June 1, 1992, at 15.

19. Mouat, *supra* note 17.

20. Summary Report of the Seminar Convened by the Canadian Department of External Affairs and International Trade and the Department of Environment, Meech Lake, Quebec, Dec. 8-9, 1991, at 5 [hereinafter Summary Report of Canadian DEA].

21. Reuter, *Earth Summit: Saving the World Had its Lighter Moments*, VANCOUVER SUN, June 15, 1992, at A9.

22. William K. Stevens, *Lessons from Rio*, N.Y. TIMES, June 14, 1992, §1, at 10.

23. Brad Knickerbocker, *World Leaders Gather at Rio for Earth Summit*, CHRISTIAN SCI. MONITOR, June 2, 1992, at 1.

24. Summary Report of Canadian DEA, *supra* note 20.

25. For the Stockholm Declaration, see U.N. Doc. A/CONF. 48/114 (1972). For the Rio Declaration, see U.N. Doc. A/CONF. 151/5/Rev.1 (1992).

merge and diverge continually. For the reader's convenience, the full text of the two declarations is included as an Appendix to this article.

II. POPULATION

The Stockholm Declaration underlined the significance of the population issue. Its preamble stated:

> *The natural growth of population continuously presents problems on the preservation of the environment, and adequate policies should be adopted, as appropriate, to face these problems.* (Stockholm Declaration, Preamble 5).

The body of the Stockholm text was however, rather vague with respect to specific solutions for a problem which was already recognized as fundamental by most member states of the United Nations.

> *Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment or development, or where low population density may prevent improvement of the human environment and impede development.* (Stockholm Declaration, Principle 16).

In a very real sense it could be argued that the implementational failures of Stockholm in a variety of areas propelled and galvanized the frenzied activity before Rio. The intervening two decades have not been kind or benign for either the planet or for its dominant species. The world's population, three and a half billion[26] at the time of the Stockholm Conference had risen to approximately five and a half billion[27] by the time delegates gathered in Rio for the Summit. It is interesting to note that the first United Nations Conference on Population held in Rome in 1954 had projected a world population figure of three and a half billion by 1980.[28] In light of those predictions, the actual figure is even more alarming. "Between 1950 and 1985, world population grew at an annual rate of 1.9 per cent compared with 0.8 per cent in the half-century preceding 1950."[29] In the present decade, it is estimated that the earth has to feed, house and clothe an additional ninety-two million people each year, eighty-eight million of them inhabiting the developing world.[30] The United Nations estimates that world population will reach seven billion

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26. WADE ROWLAND, THE PLOT TO SAVE THE WORLD 13 (1973).

27. GLOBE AND MAIL (Toronto), Apr. 29, 1992, at A1.

28. ROWLAND, *supra* note 26, at 31.

29. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 99 (citing DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS, WORLD POPULATION PROSPECTS: ESTIMATES AND PROJECTIONS AS ASSESSED IN 1984 (1986)).

30. Sandra Postel, *Denial in the Decisive Decade, cited in* STATE OF THE WORLD: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY 3, 191 (Linda Starke ed.)(relying upon POPULATION REFERENCE BUREAU, 1991 WORLD POPULATION DATA SHEET (1991)).

by the year 2010.[31] Although the crisis had escalated in seriousness over the twenty year period, the delegates at Rio were even less capable of decisive action than their predecessors at Stockholm.

The failure of the Rio Declaration to mention the population issue in precise and clear terms was perceived as a fundamental flaw. Hence what was excluded from the body of principles was as important as what was ultimately included. James Brooke of the *New York Times* suggested that "[c]lauses in documents concerning population growth were watered down after closed-door lobbying by delegates from the Vatican and Saudi Arabia, both for religious reasons."[32] This criticism is echoed by Christopher Young who asserted that "[t]he Vatican, with support from Muslim fundamentalist countries, fought successfully to draw the teeth from any declaration about the need for population control, on which other attempts at worldwide environmental progress may well depend. Heavy lobbying by the Catholic Church has managed to remove any direct mention of family planning or population control from the relevant Earth Summit documents."[33]

The position of the Catholic Church was ably presented at the Earth Summit by His Eminence Angelo Cardinal Sodano, Secretary of State for the Vatican and by Archbishop Renato R. Martino, Apostolic Nuncio and Head of the Holy See Delegation to the United Nations Conference on Environment and Development. Asserting that the position of the Holy See "regarding procreation is frequently misinterpreted,"[34] Archbishop Martino insisted that "the Catholic Church does not propose procreation at any cost."[35] He specified that "[w]hat the Church opposes is the imposition of demographic polices and the promotion of methods for limiting births which are contrary to the objective moral order and to the liberty, dignity and conscience of the human being."[36]

While conceding that "[e]veryone is aware of the problems that can come from a disproportionate growth of the world population,"[37] Cardinal Sodano emphasized the linkage between the poverty of the many and the wastage of resources by the few. Echoing Pope John Paul II, the Cardinal reminded delegates at U.N.CED that "the pollution of the environment and risks to the ecosystem do not come primarily from the most densely

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31. James Rusk, *Summit to Stress Resource Limitations*, GLOBE AND MAIL (Toronto), May 20, 1992, at A2.

32. James Brooke, *The Earth Summit; Rich Nations Offer Money, But Small Ones Raise Issues*, N.Y. TIMES, June 14, 1992, §1, at 10.

33. Cristopher Young, *The Earth Summit: Mulroney's Stand Politically Correct*, EDMONTON J., June 5, 1992, at A13.

34. H.E. Archbishop Renato R. Martino, Apostolic Nuncio, Head of the Holy See Delegation, Statement at United Nations Conference on the Environment and Development (June 4, 1992).

35. *Id.*

36. *Id.*

37. His Eminence Angelo Cardinal Sodano, Secretary of State of the Vatican, Statement at United Nations Conference on the Environment and Development (June 13, 1992).

populated parts of the planet."[38] Statistical analyses support the Cardinal's position. At the present time eighty-five per cent of the world's income is enjoyed by a mere twenty-three per cent of its population.[39] Maurice Strong who organized UNCED and served as Secretary General for both international conferences, highlighted the serious inequity between the rich and poor nations by pointing out that a child born in the developed world would consume twenty to thirty times more of the planet's resources than a child born in a developing nation.[40] The per person energy consumption of Europeans is ten times that of Africans. North Americans consume twenty times the energy utilized by Africans.[41] It was not unnoticed that the position of the religious leaders was sympathetic to and in tune with the attitude of many developing nation delegates. Glenn Godfrey, Attorney General for Belize, denied that overpopulation is one of the main causes of environmental degradation and insisted that "poverty is caused not by a growing population, it is caused rather by the failure of the developmental process to distribute the wealth . . . in a socially just manner."[42] An editorial published in *The Times* (London), was critical of the Holy See:

> [w]hat the Vatican has done, with a hint of mischief making for its own purposes, is to orchestrate the voice of Third World resentment towards such Western demographic arrogance. But it would have been far more honest to have let the argument come to the surface at Rio than to try to forestall it by diplomatic pressure.[43]

In fairness it has to be noted that developing nations are keenly aware of the serious nature of their population problem. Pakistan's Prime Minister, Nawaz Sharif, agreed that "[d]eveloping countries must assume their full share of responsibility in limiting population growth to manageable levels."[44]

There was considerable finger-pointing and mutual recrimination prior to and during the Earth Summit at Rio. The considerations on world population control fell victim both to the influence of religious tradition and to North-South wrangling. Eugene Linden put the matter in appropriate, if gloomy, perspective: "if human numbers and consumption continue to rise unabated, there is little hope for the other creatures with whom we share the earth and a high probability of catastrophe for humanity itself."[45] British Prime Minister John Major emphasized the con-

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38. *Id.*

39. Postel, *supra* note 30, at 4.

40. Michael McCarthy, *Brazil Offers to Host New Green Institution*, TIMES (London), June 4, 1992, at 11.

41. Brad Knickerbocker, *The World From . . . Rio de Janeiro*, CHRISTIAN SCI. MONITOR, June 10, 1992, at 3.

42. Glenn Godfrey, Attorney General for Belize, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

43. *The Pope and Birth Control*, TIMES (London), May 19, 1992, at 13.

44. James Brooke, *supra* note 32, at 10.

45. Eugene Linden, *Summit To Save the Earth; Population: The Uninvited Guest*,

sequences of ignoring the population crisis by stating that the Rio process "has no chance of success if we do not do much better in our efforts to slow the growth of population." He added that in failing to take such measures the Earth would destroy itself.[46] Despite the lengthy discussions which preceded Rio, the best the delegates could agree on was:

> *To achieve sustainable development and a higher quality of life for all people, States should . . . promote appropriate demographic policies.* (Rio Declaration, Principle 8).

Clearly, in tackling the most basic and fundamental social, economic and environmental problem facing the planet, the delegates at Rio regressed from the vague ambiguities agreed to at Stockholm. *Time* referred to this as "perhaps the worst example of bureaucratic obfuscation."[47]

III. POLITICAL CAUSES

The historic chasm between North and South—a chasm founded in their shared imperial past—rose to haunt delegates at both Stockholm and Rio. As the victims of decades of economic deprivation, the developing nations inevitably focussed on the legacy of colonial rule and its relation to environmental degradation. Their former imperial masters, now enjoying the status of developed countries, were less anxious to bring these political issues of the past to the surface in what had been termed an "environmental discussion." In the end the South won, to an extent. Both declarations referred to the political issue uppermost in the minds of the delegates from the developing world.

> *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating* apartheid, *racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.* (Stockholm Declaration, Principle 1).

The concern was expressed again in Principle 15 of the Stockholm Declaration:

> *Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned.* (Stockholm Declaration, Principle 15).

TIME, June 1, 1992, at 54.

46. Robin Oakley & Micheal McCarthy, *Major Promises Pounds 100m More for Green Projects*, TIMES (London), June 13, 1992, at 1.

47. Philip Elmer-Dewitt, *Summit to Save The Earth; Rich vs. Poor*, TIME, June 1, 1992, at 42.

Colonialism with its consequences was still clearly a priority on the agenda of international problems insofar as developing nations were concerned. As Dr. W.K. Chagul, Tanzania's Minister of Economic Affairs and Development Planning, commented: "The evils of *apartheid*, racial and colonial oppression, far from being irrelevant, are at the very core of environmental problems in Africa due to the degradation they cause to the human resources by taking away the rights of the many and thereby bringing benefits to only a minority."[48] Latin American nations echoed the complaints of the Africans by arguing that "the 'economic imperialism' of multi-national corporations, based in the U.S. and elsewhere, was depriving them of effective control of their economies, and resulting in the rapaciously wasteful spoliation of their resource bases, carried out under absentee managers who had no real concern for the local environment."[49]

By the time the Rio Conference occurred in 1992, the emphasis of the political concerns of developing nations had adjusted to a more marked concentration on the fate of the Palestinians, particularly those in the occupied territories under Israeli rule. In the preliminary planning phases for UNCED, it became evident that "the conference was to be as much about the North-South dialogue between the rich and the poor as it was about the environment."[50] The North-South dialogue zeroed in on the Israeli occupation of Arab land to highlight an issue which is a sore point with proponents and opponents of Israeli actions with respect to its Middle East neighbors. The Arabs and the Palestinian representatives in particular were anxious to incorporate some form of condemnation of oppression and occupation into the Rio Declaration. Farouk Kaddoumi, Head of the Political Department of the Palestine Liberation Organization, stated at UNCED that "[p]rograms aimed at environmental upgrading are closely related to the necessity of removing all forms of oppression."[51] Mr. Kaddoumi emphasized the consequences of Israeli control over Palestinians: population over-crowding, deforestation, reduction of the area of cultivable land, overgrazing, reduction of available water supplies, use of herbicides by settlers in the Occupied Territories, soil erosion, and desertification.[52] The Palestinian delegate concluded that the condition of occupation precluded the fulfilment of sustainable development.[53] The Syrian Vice-President, Abdul-Halim Khaddam, included Israeli activities in Lebanon in his denunciation of Israel's environmental

48. ROWLAND, *supra* note 26, at 52.

49. *Id.* at 53.

50. David D. Newsom, *Paving the Road to the U.N. Environmental Conference*, CHRISTIAN SCI. MONITOR, Apr. 8, 1992, at 18.

51. Farouk Kaddoumi, Head of the Political Department of the Palestine Liberation Organization, Statement at United Nations Conference on the Environment and Development (June 11, 1992).

52. *Id.*

53. *Id.*

record.[54] At time of writing this article, the whole world is watching the fate of more than four hundred Palestinians (a number of them professors and physicians), who were deported by Israel, rejected by Lebanon, and who are at this moment living in makeshift camps in a "no man's" land between the two countries.[55] Their plight in adjusting to conditions without any modern amenities has caught global attention and has no doubt garnered more sympathy for the Palestinian cause, a consequence probably unforeseen by the Israeli government when it issued the deportation orders. The expulsions were an Israeli retaliation "for the murder of a paramilitary border guard by the Palestinian fundamentalist Hamas movement."[56]

During the Rio preparatory process, Israel objected strenuously to the attempt to castigate its policies in the Occupied Territories in the drafts of the statement of principle.[57] At UNCED, however, the Israelis were more positive in tone. Conceding that "conflicts and dispute all over the world prevent genuine cooperation,"[58] Dr. Uri Marinov, Director General of Israel's Ministry of the Environment, reminded delegates of the environmental discussions which formed part of the on-going Middle East peace process and suggested that "[t]he environmental negotiations of the current peace talks should be used first for environmental purposes; but the opportunity they present as a basis for overcoming political controversy should not be ignored."[59]

According to *The Times* (London), the Americans brokered a deal on this Middle Eastern controversy over the Rio Declaration: "A deal was struck by the Americans on Israel's behalf . . . by which the reference will be removed from the summit's giant work programme, Agenda 21, while remaining in the declaration."[60] The controversial clause in the Rio Declaration read:

> *The environment and natural resources of people under oppression, domination and occupation shall be protected.* (Rio Declaration, Principle 23).

The satisfaction of the developing nations was expressed by the Minister of Foreign Affairs of the United Arab Emirates. Rashid Abdullah Al-

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54. Abdul-Halim Khaddam, Vice-President of the Syrian Arab Republic, Statement at United Nations Conference on the Environment and Development (June 12, 1992).

55. Patrick Martin, *Exiles Find Vindication in No Man's Land*, GLOBE AND MAIL, Dec. 31 1992, at A.

56. *Fury Over Israeli Expulsions*, 147 MANCHESTER GUARDIAN, WASH. POST WEEKLY 1 (Dec. 27, 1992).

57. Michael McCarthy & Robin Oakley, *Green Charter Agreed at Rio*, TIMES (London), June 12, 1992, at 7.

58. Dr. Uri Marinov, Director General of the Israeli Ministry of the Environment, Statement at United Nations Conference on the Environment and Development (June 3, 1992).

59. *Id.*

60. McCarthy & Oakley, *supra* note 57, at 7. *See also UNCED: Rio Conference on Environment and Development*, 22 ENV'T POL'Y AND L. 204 (1992).

Noaimi informed colleagues at UNCED that his nation welcomed "the principle contained in the agreed declaration of the Conference pertaining to the need to provide protection for the environment and natural resources of the peoples suffering from oppression, domination and occupation."[61]

IV. NATIONAL SOVEREIGNTY

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies . . . .* (Stockholm Declaration, Principle 21).

It is evident that most developing nations, having suffered years of foreign exploitation and rule, are still wary of international phraseology which they believe may restrict the exercise of their recently-acquired independent status. This hesitancy was evident at Stockholm. During the lengthy process which resulted in the formulation of the Stockholm Declaration, the delegation from the People's Republic of China (then a new member of the United Nations[62]) proposed its own series of principles which included the following rather significant clause: "Any international agreement should respect the sovereignty of all countries. No country should encroach on another under the pretext of environmental protection."[63] The Chinese suggestion is reflected in the Stockholm Declaration.

The emphasis on national sovereign rights was by no means exclusively a developing world concern. The Canadian delegation presented a draft of principles for incorporation in the Stockholm Declaration. The first of those principles reads: "Every state has a sovereign and inalienable right to its environment, including its land, air and water and to dispose of its natural resources."[64] It is apparent that Canada "played a central role in the drafting of Principle 21."[65] Although the United Nations Charter bases the Organization "on the principle of the sovereign equality of all its Members,"[66] one wonders whether the frequent restatement of national sovereignty is really necessary in light of the growing realization that environmental catastrophe is a global concern and will require international efforts to alleviate the plight of its victims. It would appear that all nations rich and poor are anxious to preserve their national rights even while conceding to the global nature of the problems they are

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61. Rashid Abdullah Al-Noaimi, Minister of Foreign Affairs of the United Arab Emirates, Statement at United Nations Conference on the Environment and Development (June 9, 1992).

62. *See* United Nations Document General Assembly Resolution 2758 (XXVI), Oct. 25, 1971, concerning the recognition of the People's Republic of China and the expulsion of Taiwan from membership in the World Organization.

63. ROWLAND, *supra* note 26, at 93.

64. *Id.* at 88.

65. Summary Report of Canadian DEA, *supra* note 20, at 7.

66. U.N. Charter art. 2.

tackling.

The rather wordy tribute to national sovereign rights in an international document of principles was interestingly repeated almost verbatim in the Rio Declaration. The only difference was the addition of two significant words in the Rio version:

> . . .*the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies*. . . (Rio Declaration, Principle 2)(emphasis added).

With the inclusion of developmental policies, the Member States of the United Nations underscored the twin objectives of UNCED - namely environment and development. They also raised this principle to the second in ranking order, possibly signifying its importance.

In view of the fact that the Rio Declaration in its preamble reaffirmed the Stockholm Declaration and specifically sought to "*build upon it*," (Rio Declaration, Preamble, ¶ 3), the restatement verbatim of the principle of sovereign rights in the 1992 document would appear to be redundant. Its very presence in both formulations suggests the significance of the issue of national sovereignty to Member States of the United Nations.

As the world has collectively intervened militarily to free Kuwait from Iraqi aggression and has intervened humanely to feed the starving in Somalia, a declaration justifying and emphasizing the primacy of national sovereignty would appear to be almost regressive in terms of the universalist ideals of the Earth Summit. At time of writing, developed nations of Europe and North America are coming under increasing pressure to intervene in Bosnia to force the Serbs to stop killing the residents of Sarajevo. As William Thorsell commented, "[a]t the UN, the principle of self-authorized intervention in the 'domestic affairs' of nations for 'higher' purposes is emerging *ad hoc*."[67]

Simultaneously, there is a definite back-lash from both developing and developed nations which find safety in clinging to the trappings of nationalism and are loath to concede to the new internationalism which accompanies environmental concerns. The Editor of *Environmental Policy and Law* explained the situation at UNCED very lucidly:

> The problems of national sovereignty came again to the fore. Clearly, when world responsibility is accepted for environmental danger, some States have difficulty in accepting that this will also entail giving up some of their rights and accepting new responsibilities. On the one hand, this is understandable. On the other, all states have to accept that we have only one earth and that such sensitive aspects can only be solved with compromise on both sides.[68]

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67. Thorsell, *supra* note 2, at D6.

68. Wolfgang E. Burhenne & Marlene Jahnke, *Introduction* to 22 ENVTL. POL'Y & L., (Aug. 1992).

The addition of "developmental" considerations in the Rio Declaration and its placement in tandem with environmental policies also signalled a new effort at integration of the two concepts: a perception developed in the light of events arising from the Stockholm Conference when it became apparent from the plethora of subsequent discussions, analyses and conferences held on numerous facets of these issues that the interconnection had to be stressed. It is now obvious that over-development in some countries has resulted in environmental degradation while underdevelopment in others has also caused environmental decline. The World Commission on Environment and Development expressed this realization:

> Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.[69]

The difficulty lies, not so much in realizing this interconnection in theory but in keeping it in the forefront in practice. The practice of such integrated thinking will require considerable effort and adjustment of policies in the realm of resource management and business in every nation on Earth.

V. INTERNATIONAL COOPERATION

Having deferred substantively in both documents of principle to the primacy of national sovereign rights, the delegates were equally eager to demonstrate their commitment to the concept of international cooperation. Realizing that environmental restoration cannot proceed exclusively in the national sphere, the Member States of the United Nations pledged themselves to seek universalist solutions to the serious crisis of planetary decline. A study of both declarations illustrates the tacit adherence to the idea of international cooperation in environmental matters. The movement from Stockholm to Rio is indicative of mounting world apprehension because of environmental degradation and therefore reflects not so much a new trend but a more specific sense of direction.

> *A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.* (Stockholm Declaration, Preamble, No. 7).

The Stockholm Declaration called for

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69. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 37.

> *International co-operation . . . in order to raise resources to support the developing countries in carrying out their* [environmental] *responsibilities.* (Stockholm Declaration, Preamble 7).

These appeals for international effort and cooperation were echoed in Principle 24:

> *International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.* (Stockholm Declaration, Principle 24).

It is interesting to note that in the very principle stressing the need for cooperation, mention had to be made once again of the importance of state sovereignty.

At Rio, delegates included a brief mention of the concept of cooperation in their Preamble:

> *With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people . . . .* (Rio Declaration, Preamble, para 4),

and also in the Preamble:

> *Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system.* (Rio Declaration, Preamble, para 5).

The concept of international cooperation was spelled out in far greater detail in the Rio document, possibly because the experience of two decades between Stockholm and Rio had made this matter of critical importance. Hence while governments around the world reiterate their commitment to national rights, they are now keenly aware of their mutual vulnerability when facing ecological crises. "Major disasters—Valdez, the Brazilian forests, fisheries, Chernobyl, 3-mile Island, the Gulf War and droughts in Africa—have added sharpness and urgency to the world's concern."[70] The pace of these disasters appears to have intensified. One hundred and ninety-three people were injured when dioxin leaked in Seveso, Italy in 1976.[71] An accident at a chemical plant in 1979 in Novosi-

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70. Geoffrey Bruce, *A Review of the Stockholm Conference of 1972, Of Some Significant Developments in the Environment Since 1972, and of Some Major Challenges and Opportunities for Canada in Preparing for UNCED in 1992*, in Summary Report of Canadian DEA, *supra* note 20, at 24.

71. HELEN CALDICOTT, IF YOU LOVE THIS PLANET 76 (1992).

birsk, U.S.S.R. killed three hundred people.[72] Leakage in 1984 at a pesticide plant in Bhopal, India resulted in the death of approximately two thousand five hundred people.[73] Although disasters of this nature occur within national boundaries, as the Chernobyl example shows, the consequences can be international. The world is waking up to the fact that although we may not be under nuclear threat at the moment, there are other potentially serious and life-threatening dangers lurking in every nation of this planet. There is more consensus now than there was in 1972 that "[i]nternational agreement is the best way to solve environmental problems that transcend national borders."[74]

Despite the many environmental agreements and treaties which have marked the two decades between Stockholm and Rio, few would dispute the fact that "[t]he world's environment is more degraded and is less stable than it was 20 years ago."[75] The Worldwatch Institute has estimated that earth has lost approximately five hundred million acres of trees since 1972, "an area roughly one-third the size of the continental U.S."[76] Equally catastrophic, for the growth of food crops, the world has lost about five hundred million tons of topsoil, "an amount equal to the tillable soil coverage of India and France combined."[77] Food production per capita declined in ninety-four countries between 1985 and 1989.[78] Al Gore, Vice-President of the United States, has commented that "[m]odern industrial civilization, as presently organized, is colliding violently with our planet's ecological system."[79]

Environmental degradation is proceeding at an alarming pace in both developed and developing nations. No country is immune from the impact of damage to ecosystems. The shared problem makes cooperative effort the only viable alternative. The World Commission on Environment and Development recognized the new reality:

> Until recently, the planet was a large world in which human activities and their effects were neatly compartmentalized within nations, within sectors (energy, agriculture, trade), and within broad areas of concern (environmental, economic, social). These compartments have begun to dissolve. This applies in particular to the various global 'crises' that have seized public concern, particularly over the past decade. These are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one.[80]

Cooperation at Rio was framed along fairly precise lines. Although

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72. *Id.*
73. *Id.*
74. Cairncross, *supra* note 4, at 5.
75. Bruce, *supra* note 70.
76. Elmer-Dewitt, *supra* note 47, at 42.
77. *Id.*
78. Sharon Begley, *Is it Apocalypse Now?*, NEWSWEEK, June 1, 1992, at 36.
79. AL GORE, EARTH IN THE BALANCE 269 (1992).
80. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 4.

the language of the Rio Declaration is more bureaucratic than visionary, it is probably more useful than the more nebulous pronouncements which were formulated at Stockholm. Inevitably, the theme of cooperation underlies both documents. The more specific content of the Rio Declaration is indicative of the more serious attention paid to environmental cooperation since the 1970's.

> *States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.* (Rio Declaration, Principle 7)

Having stressed the concept of global partnership—implying joint responsibility—the Rio Declaration went on to outline the areas wherein this cooperation should occur:

> *States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.* (Rio Declaration, Principle 12)

The recognition of the need for more justice in the distribution of the economic benefits was not merely an act of deference to developing nations. It reflects a growing realization in the developed, richer nations that the so-called Third World is set on a developmental course, regardless of the environmental consequences, simply because these poor nations have no other choice if they are to give their present populations some kind of decent life. As Al Gore has suggested: "Rapid economic improvements represent a life-or-death imperative throughout the Third World. Its people will not be denied that hope, no matter the environmental costs. As a result, that choice must not be forced upon them."[81] One of the great challenges of the post-Rio process, already underway, will be the implementation of this principle in the cause of global sustainable development and hopefully, a cleaner environment.

VI. INTERNATIONAL COOPERATION WITH RESPECT TO ENVIRONMENTAL DAMAGE

The Rio Declaration urges States to cooperate to prevent transboundary pollution.

> *States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.* (Rio Declaration, Principle 14)

This issue is of more than academic concern, especially since the recent signing of the North American Free Trade Agreement between Canada,

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81. GORE, *supra* note 79, at 279.

the United States of America and Mexico.[82] *Newsweek*, referring to a survey by the government of the United States, stated that "four of five American companies operating plants across the border in Mexico admitted they were there to take advantage of weak environmental laws."[83] It will take an enormous amount of government-to-government persuasion to ensure that the economic boom now proceeding in Mexico does not result in an environmental catastrophe.

In 1986, an accident at a nuclear reactor in Chernobyl, U.S.S.R. killed at least twenty-five people and sent radioactive fallout across Europe.[84] "Current estimates predict anything from 14,000 to 475,000 cancer deaths worldwide from Chernobyl. No one will ever know for certain."[85] The reaction to this disaster at UNCED was strong and the language of the principles more firm than is normal for such documents:

> *States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted,* (Rio Declaration, Principle 18)

and this further provision:

> *States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.* (Rio Declaration, Principle 19)

The mandatory nature of the language is very significant both in terms of the concerns expressed and with respect to the precise obligations placed on Member States of the United Nations regarding their responsibilities should such an event occur. The Rio language carries more punch than the milder provision on toxic substances included in the Stockholm Declaration:

> *The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.* (Stockholm Declaration, Principle 6)

The Stockholm Declaration followed the approach of opting for the fur-

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82. Canadian Prime Minister Brian Mulroney, Address at the Kennedy School of Government, Harvard University (Dec. 10, 1992).

83. *The Seven Deadly Sins*, NEWSWEEK, June 1, 1992, at 30.

84. CALDICOTT, *supra* note 71, at 77.

85. Nicholas Lenssen, *Confronting Nuclear Waste*, *in* STATE OF THE WORLD 1992 46, 49 (Linda Starke ed., 1992).

ther creation of international law to deal with transboundary pollution:

> *States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.* (Stockholm Declaration Principle 22)

This provision was repeated in the Rio Declaration:

> *States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.* (Rio Declaration Principle 13)

The problem of transboundary environmental damage was interestingly enough linked both at Stockholm (Principle 21) and at Rio (Principle 2) with the emphasis on national sovereign rights, already discussed above under the sub-heading "national sovereignty." Accordingly, the following provision appeared in the Stockholm Declaration:

> *States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.* (Stockholm Declaration, Principle 21)

This part of Principle 21 was repeated verbatim in Principle 2 of the Rio Declaration. The linkage of sovereign rights and national responsibilities was largely credited to Canada's active participation at Stockholm. As the Canadian government explains:

> Principle 21 of the 1972 Stockholm Declaration represented a watershed in international environmental law in acknowledging the sovereign right of states to exploit their own resources and the responsibility of states "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." Canada played a central role in the drafting of Principle 21. The conceptual framework provided by Principle 21 has been applied successfully by Canada in other negotiations, and is the legal foundation of virtually every international environmental agreement and legal instrument concluded since Stockholm.[86]

VII. THE RIGHT TO DEVELOPMENT

The provisions on development were of primary importance to delegates at both conferences because although the principles were not deemed to be legally binding, there was an implicit feeling that the more the South could wrest in developmental assistance promises from the

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86. Summary Report of Canadian DEA, *supra* note 20, at 7-8.

North, the more likely was it that the Declarations could be utilized to hold the rich nations accountable for their lapses with respect to sharing the world's wealth equitably. Both Declarations highlight the importance of development for the poorer nations and acknowledge the primacy of that concept. Indeed it could even be suggested with a degree of justification (albeit a trace of exaggeration) that the Rio Declaration is almost a sustainable development charter for the South. There are at least six principles in the Rio Declaration which deal specifically with the concerns of developing nations. The Stockholm Declaration includes the subject in its Preamble and in approximately six of its principles, though arguably, both documents are filled with indirect references which apply to the poor and rich nations.

It is important to stress that developmental priorities are reflected in the Declaration on the Right to Development adopted by the United Nations General Assembly in 1986 which specifies that "[s]tates have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."[87] The South could argue at Rio that it was simply acting in line with the principles of the Declaration on the Right to Development. The following principle incorporated into the Rio Declaration illustrates this point:

> *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.* (Rio Declaration, Principle 3)

The nations of the South, in their rush to development, threaten to destroy the global environment even more vigorously than the North did in its somewhat slower industrial revolution. Self-interest in both North and South now dictates an approach which would assist Southern development in a manner that is not environmentally degrading so that the atmosphere, the air and the water of the entire planet can ensure the future survival of people in all parts of the globe. The South now holds a crucial card in its favor and has played it to the hilt in continually reminding the North that developed nations contribute most of the pollution of the planet, consume most of the resources and generate most of its waste, while developing nations shoulder most of its economic backwardness, its degrading poverty and its enormous debt load.[88]

The shared imperial past of Northern and Southern nations has left a legacy of inequitable distribution of the world's limited wealth. Political subjugation resulted in economic exploitation. Southern resources and

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87. *Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR 3d Comm., 41st Sess., Supp. No. 53, Art. 3.1, U.N. Doc. A/C.3/41/SR (1986). *See also* Ranee K.L. Panjabi, 30 VA. J. INT'L L. (1989)(reviewing James Crawford ed., THE RIGHTS OF PEOPLES (1986)).

88. For a strong example of the South's position see the CSE Statement on Global Environmental Democracy To Be Submitted to the Forthcoming U.N. Conference on Environment and Development, Centre for Science and Environment, New Delhi, India.

markets were critical to the industrial development of imperial nations like Britain and France. In the past, the South had no choice but to contribute to the prosperity of the North. In fact, its contribution to Northern affluence still outweighs the foreign aid it receives from developed nations. The World Bank estimated that at the end of 1991, the total debt stock of developing nations was $1281 billion.[89] This crippling debt burden can be traced back to the 1970's when sudden increases in oil prices and low interest rates induced many developing nations to borrow from the rich nations. As interest rates rose in the 1980's, these countries found it increasingly difficult to meet their debt obligations. "Between 1973 and 1980, Third World debt increased by a factor of four, to $650 billion."[90] The consequences to the environment are dramatic:

> Rising poverty and the desperate attempts of Third World countries to earn hard currency carry not only a heavy human and economic cost but also an environmental one. Many indebted nations rely on their natural resources—whether timber or minerals like copper—to raise foreign exchange from trade . . . . Environmental resources are being exhausted just to pay debt.[91]

Although Official Development Assistance to the South totalled a significant $49.7 billion by 1988, there was still a "massive, perverse redistribution of income," because the outward flow from Southern nations exceeded by about $8 billion the total official development assistance payments.[92] UNICEF estimated that about half a million children in the developing world died in 1988 because "social progress in Third World countries has been stalled or reversed by crushing debts and falling revenues."[93] Clearly, the South is still subsidizing the high standard of living in the North. It was inevitable that the delegates at Rio would have to confront this issue—the most fundamental in the North-South dialogue—in formulating all the agreements which were produced at that conference.

At Stockholm in 1972 delegates realizing that global environmental degradation was a consequence of industrialization in the North and under-development in the South, believed that narrowing the gap between the rich and poor nations was one important solution.

> *In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sani-*

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89. Government of Canada (United Nations Conference on Environment and Development Reports), *Debt Conversion Initiative to Promote Sustainable Development*, June, 1992.

90. CALDICOTT, *supra* note 71, at 130.

91. BEN JACKSON, POVERTY AND THE PLANET 96-97 (1990).

92. IVAN L. HEAD, ON A HINGE OF HISTORY 42-44 (1991).

93. Charlotte Montgomery, *Children Paying Foreign Debt Load With their Lives, UNICEF Says*, GLOBE AND MAIL, Dec. 21, 1988, at A9.

> *tation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap between themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development.* (Stockholm Declaration, Preamble 4)

Unfortunately, the ideals of Stockholm failed to materialize. Jean Charest, Canada's Minister of Environment, reminded delegates at the Rio Earth Summit that in the past "thirty years, income disparities between the North and the South have grown from twenty times to sixty times." He commented that "this trend is simply not sustainable."[94] By 1992, the escalation of the world's economic problems made for sharper reactions at Rio. This time actual blame was assigned to the rich nations:

> *States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.* (Rio Declaration, Principle 7)

The nations of the South could justify their somewhat rancorous mood at Rio with plenty of statistical evidence. To compare the situation with respect to two prominent nations, the United States of America and India: the U.S.A, with five percent of the world's population, consumes twenty-five percent of its energy, emits twenty-two per cent of all CO_2 produced and accounts for twenty-five per cent of the world's GNP.[95] On the other hand, India, with sixteen per cent of the world's population, uses a mere three per cent of its energy, emits three per cent of all CO_2 produced and accounts for only one percent of global GNP;[96] and India is by no means among of the world's poorest nations. For in that type of comparison, the disparities would be far greater. From the perspective of the North-South divide, the North "which has 25 percent of the world population, consumes 70 percent of the planet's energy, 75 percent of its metals, 85 percent of its wood."[97]

To understand the shift in mood over the two decades between Stockholm and Rio, one could compare the gentle suggestion in the Stockholm Declaration:

> *The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion*

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94. Jean Charest, Minister of Environment for Canada, Statement at United Nations Conference on the Environment and Development (June 11, 1992).

95. Elmer-Dewitt, *supra* note 47, at 2.

96. *Id.* at 23.

97. Begley, *supra* note 78, at 36.

> *and to ensure that benefits from such employment are shared by all mankind.* (Stockholm Declaration, Principle 5)

with the far more strident tone in the Rio Declaration:

> *To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption* . . . . (Rio Declaration, Principle 8)

Critics derided the weakness of the Rio provision calling for the elimination of unsustainable patterns of development. Frank McDonald of *The Irish Times* referred to the "watered-down reference to the contentious issue of over-consumption by the rich North."[98] He also pointed to the use of the milder word "should" rather than "shall" in Principle 8 of the Rio Declaration and commented that this "tells its own tale about the nit-picking at the core of UNCED."[99] It has to be remembered however, that the United States of America, whose consumer society was uppermost in the mind of those who supported Principle 8, was itself strenuous in rejecting any condemnation of its affluent way of living. American delegates insisted "over and over that 'the American life-style is not up for negotiation.' "[100] Given that approach by the world's only remaining superpower, the inclusion of any provision on life-style limitation may be deemed a bold and progressive development. The South may not have won entirely at Rio but its rhetoric was strident. Indian environmentalist Maneka Gandhi pointed out that one western child consumes as much as one hundred and twenty-five eastern children do. She concluded that "nearly all the environmental degradation in the east is due to consumption in the west."[101]

If the developing nations could be said to have a "wish list" at Rio, there are indications of their desires in the Rio Declaration. The eradication of poverty was primary:

> *All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.* (Rio Declaration Principle 5)

Among developing nations there are also disparities with respect to income, resources and degree of development. Inevitably the poorest of these nations have elicited universal compassion, compassion most recently illustrated in the United Nations operation to feed the starving people of Somalia. The leading role played by the United States of America in this operation "Restore Hope" is in sharp contrast to the

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98. McDonald, *supra* note 14, at 6.
99. *Id.*
100. Elmer-Dewitt, *supra* note 47, at 42.
101. Begley, *supra* note 78, at 36.

somewhat self-centered positions espoused by American delegates at Rio, positions which drew criticism from delegates and the media alike. At Rio, delegates agreed that:

> *The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.* (Rio Declaration, Principle 6)

At Stockholm, delegates assumed that one solution to such grinding poverty was price stability:

> *For the developing countries, stability of prices and adequate earnings for primary commodities and raw material are essential to environmental management since economic factors as well as ecological processes must be taken into account.* (Stockholm Declaration, Principle 10)

Unfortunately, the intervening two decades saw little or no improvement in this regard. In fact, the poorest nations of the world have few alternatives to primary commodity trading. In 1972, a year after the Stockholm Conference, oil-producing countries in the Middle East combined to raise the price of oil which skyrocketed from a little over one dollar a barrel at the beginning of the 1970's to approximately forty dollars in 1979.[102] Nations involved in commodity production of tin, coffee and cocoa[103] also attempted to cash in on what appeared to be a new global economic structure of more equity and fairness in trade. Their enthusiasm was to be short-lived. The lack of diversity of many developing economies—part of the imperial heritage which geared these economies to the particular needs of the colonial power—meant that often these nations, short of foreign exchange, tended to overproduce their major agricultural commodity to earn ready cash. This led to gluts and other problems as Northern nations, anxious to protect their own farming sector, protected themselves against commodity imports.[104] As Ivan Head explains:

> In the countries of the South . . . there is in all-too-many instances an overwhelming dependence on a single economic activity. Simply stated, most economic eggs are in one basket. And to make dependence even more keen, more often than not those eggs assume the form of a single agricultural commodity—coffee, cocoa, sugar, sisal, ground-nuts, etc.—or a single mineral—tin, copper, gold, as examples.[105]

Slower growth and a world recession have also led to a decline in the North in demand for some commodities from the South.[106] Ivan Head describes the consequences of such undiversified economic systems:

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102. JACKSON, *supra* note 91, at 65.
103. *Id.*
104. *See* HEAD, *supra* note 92.
105. *Id.* at 46.
106. *See* JACKSON, *supra* note 91, at ch. 4.

> Should world prices collapse in one of these commodities, or should access to a major market be blocked, the results can be catastrophic. If the bulk of foreign exchange earnings is derived from that product, government income falls, social programs suffer, all related economic activity (transportation, processing, etc.) stagnates, and the country finds itself in desperate circumstances. This is the reality of an undiversified economy. This is the disadvantage of a seller in a buyer's market.[107]

Should the North succeed in developing a more equitable trading system to encourage developing nations to diversify economically and to export goods which the North no longer manufactures, there is a possibility that less Northern funding will have to be allotted for aid projects in those nations.

Developing nations in their "wish list" also included the following provision:

> *States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.* (Rio Declaration, Principle 12)

The developing nations also feared that environmentalism could become another means of justifying trade restrictions on imports into the North from Southern nations. This was a major concern at Rio. Malaysia put up a stiff resistance against all attempts at environmental labelling of Southern products. The Malaysians defeated these green labelling plans which would have enabled consumers to avoid timber from rain forest sources. As the South does not generally use eco-labelling on products from the North, the Malaysians were able to convince delegates that such practices by the North would establish a double standard.[108] In response to Southern apprehensions, the following terms constituted a second paragraph to Principle 12:

> *Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.* (Rio Declaration, Principle 12)

The last sentence of Principle 12 in the Rio Declaration is somewhat more precise than the following rather vague provision in the Stockholm

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107. HEAD, *supra* note 92, at 46. 46.

108. Interview with Dr. Lim Keng Yaik, Malaysian Minister of Primary Industries (Canadian Broadcasting Corporation's News Network: B.B.C. News and Current Affairs (during June 1992)).

Declaration:

> *International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing.* (Stockholm Declaration, Principle 24)

Some of the Rio formulations, though weak from an environmental point of view, have more clarity than the cloudy promises undertaken by Member States at Stockholm. With respect to world trade and environmental policies, Stockholm's submission:

> *The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.* (Stockholm Declaration, Principle 11)

VIII. DEVELOPMENT: TECHNOLOGY TRANSFER

High on the South's "wish list" is the issue of science and availability of technology. The developing nations are well aware that their economic situation precludes the investment in research and development which continues to afford a safely comfortable future for the economies of the North. In a world in which technology becomes obsolete so quickly, sustained commitment to scientific research has become the key to economic progress. The South has always demanded that the North accord it the benefits of this technology so that it can also develop at a pace acceptable to its burgeoning population. This issue was as important at Stockholm as it was at Rio. The repetition and emphasis on this matter underscores the feeling among the poorer nations that they have been deprived by the rich nations not merely of the past and the present but of their future as well. Hence the issue of technology transfer was on occasion specified and sometimes inferred in the Stockholm Declaration.

> *Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.* (Stockholm Declaration, Principle 9)

The Declaration further provides:

> *Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.* (Stock-

holm Declaration, Principle 18)

It is followed by this surprisingly specific principle:

> *Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connexion, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.* (Stockholm Declaration, Principle 20)

Additionally, Principle 12 called for *additional international technical and financial assistance* for developing countries.

Unfortunately, emphasis in a body of principles, albeit an international code of principles, was no guarantee of performance by member nations who acceded to the Stockholm Declaration. In the intervening two decades between Stockholm and Rio, developing nations found that access to western technological advances was neither easy nor cheap. In 1980, eight years after the Stockholm promises, developing countries paid approximately two billion dollars in fees and royalties mainly to industrial countries.[109] Although there is widespread support for the sharing of technology, there is an important obstacle which prevents widespread fulfilment of this Stockholm aspiration. Industrial countries have evolved elaborate legal systems for protecting the patent rights of inventors and discoverers. The fact that many of these are in private hands makes it "difficult for governments to transfer them on noncommercial terms."[110]

Because of the importance of proprietary rights in industrialized societies, patent protection arguably acts as an incentive for the development of new technology.[111] The statistics bear out the significance of this point: in 1980, "industrialized market economies accounted for 65 per cent of the world total of patents granted, and the socialist countries of Eastern Europe held 29 per cent."[112] Developing countries held a mere six per cent of global patents with many being granted to non-residents.[113] There is a crying need for a sharing of the world's scientific resources. As the World Commission on Environment and Development has explained,

> [t]he promotion of sustainable development will require an organized effort to develop and diffuse new technologies, such as for agricultural

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109. U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT THIRD SURVEY (1983).

110. Hilary F. French, *Strengthening Global Environmental Governance*, *in* STATE OF THE WORLD 1992 165 (Linda Stark ed., 1992).

111. *Id.*

112. COMMONWEALTH WORKING GROUP, TECHNOLOGICAL CHANGE (1985).

113. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 87.

> production, renewable energy systems, and pollution control. Much of this effort will be based on the international exchange of technology: through trade in improved equipment, technology-transfer agreements, provision of experts, research collaboration and so on.[114]

Vice-President Elect of the United States, Albert Gore, has called for the "rapid creation and development of environmentally appropriate technologies— especially in the fields of energy, transportation, agriculture, building, construction, and manufacturing—capable of accommodating sustainable economic progress without the concurrent degradation of the environment," and for the quick transfer of this information to all nations especially the developing nations.[115] He does, however, stress the importance of more secure protection for patents,[116] in view of the fact that "the dissemination of new, appropriate technologies will likely be critical to our success in saving the environment."[117] It will be interesting to see whether the Clinton Presidency will implement these ideas. The American people have apparently voted for a new environmental consciousness in Washington. Should this transpire, academics may, in another two decades, be lauding the fact that the government of the world's most powerful nation fulfilled this commitment made at Rio:

> *States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.* (Rio Declaration, Principle 9)

Although the operative word was 'should' and not the stronger 'shall', given the political climate resulting from the North-South divide at Rio and the somewhat controversial stance adopted by the American government of President George Bush,[118] this provision for technological transfer was probably the best that could be achieved. E-Hyock Kwon, Minister of Environment for the Republic of Korea, reflected the South's perceptions at Rio when he insisted that "[t]he policies, information and technologies for sustainable development should be available and accessible to all countries."[119]

IX. IMPLEMENTATION OF ENVIRONMENTALLY-SAFE DEVELOPMENT

At Stockholm delegates concluded that the key to successful per-

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114. *Id.*

115. GORE, *supra* note 79, at 306.

116. *Id.* at 320-321.

117. *Id.* at 318.

118. The United States refused to sign the Bio-Diversity Treaty because of a perceived threat to its biotechnology industry. This action earned it much criticism at Rio and around the world.

119. E-Hyock Kwon, Minister of Environment, Republic of Korea, Statement at United Nations Conference on the Environment and Development (June 11, 1992).

formance of development projects with an environmental focus was through the concept of planning, mainly to be exercised at the national level.

> *Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.* (Stockholm Declaration, Principle 14)

The concept of "planning" was applied to the issues of human settlements and urbanization:

> *Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all.* (Stockholm Declaration Principle 15)

and to resource management:

> *In order to achieve a more rational management of resources and thus to improve the environment, states should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population.* (Stockholm Declaration, Principle 13)

Planning for environmental improvement was to be a fundamental task of nation states:

> *Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with the view to enhancing environmental quality.* (Stockholm Declaration, Principle 17)

Although the concept of planning has now in some minds acquired a socialist tinge—social democracies like Nehru's India engaged in elaborate five year economic plans as did communist states like U.S.S.R.—there was clearly a need in the 1970's for each state to produce a coherent system for tackling environmental concerns. In the 1970's the concept of planning was the method resorted to by many of the newly-independent nations who utilized this idea to develop their fledgling economies. However, planning was easier than performance. As the 1970's and 1980's wreaked economic havoc on many developing nations, the guiding concepts of the Stockholm era had to be trimmed to the realities of the new economic world order which illustrated that economic success came not from massive governmental action plans, but from the operation of free market forces.

The concept of planning was not repeated in the Rio Declaration. Instead, more specific duties were assigned to national governments:

> *1. States shall enact effective environmental legislation.* (Rio Declaration, Principle 11)
> *2. States shall develop national law regarding liability and compen-*

sation for the victims of pollution and other environmental damage. (Rio Declaration, Principle 13)

It is important to note that this obligation was also included in Principle 22 of the Stockholm Declaration.

Transboundary waste disposal, now a serious threat to many societies, was prohibited—albeit somewhat mildly—at Rio:

3. States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. (Rio Declaration, Principle 14)
4. National authorities should endeavour to promote the internalisation of environmental costs. (Rio Declaration, Principle 16)
5. Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. (Rio Declaration, Principle 17)
6. States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. (Rio Declaration, Principle 18)
7. States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith. (Rio Declaration, Principle 19)

The obligations at Rio, if adhered to by Member Nations of the United Nations, do form a cohesive body of environmental guiding principle. It is clear that Rio moved ahead of Stockholm in specifying the duties of governments.

X. DEVELOPMENT: THE APPREHENSIONS OF DEVELOPING NATIONS

In 1972 the Brazilian delegation argued that "environment is a conspiracy of the rich to keep us in a state of happy savagery."[120] No nation reflects the change in mood from the 1970's to the 1990's as clearly as Brazil. Brazil's transformation from the *bete noire* of Stockholm[121] to the welcoming host at Rio dramaticly illustrates the fact that developing nations have now realized that environmental concerns are their problem and not merely some Northern fad.

Confrontation erupted at Stockholm over Brazil's plan to construct a dam on the Pirana River, which it shares with Argentina. Brazil argued that developing nations could not afford the luxury of environmental protection and lobbied strongly against a draft principle which stated: "Rele-

120. Summary Report of Canadian DEA, *supra* note 20, at 4.
121. ROWLAND, *supra* note 26, at 53.

vant information must be supplied by states on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction."[122] This principle, originally numbered 20, "was to be the only section of the Declaration on the Human Environment tabled and left for debate in the next meeting of the General Assembly."[123] When in late 1972, the United Nations General Assembly approved the Stockholm decisions, Principle 20 of the draft Declaration was not re-inserted into the final text and "had been effectively erased."[124]

The consultative principle was adopted at Rio:

> *States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary effect and shall consult with those States at an early stage and in good faith.* (Rio Declaration, Principle 19)

Developing nations were initially quite skeptical about the proposed environmental gathering at Stockholm. Development and escape from crippling poverty were uppermost in the minds of Southern governments, not environmental clean-up and conservation. As Wade Rowland comments,

> [w]hen the proposal for an environment conference was first broached, opinion among the developing nations ranged from an assumption that problems relating to the environment were a concern for the highly-developed nations alone . . . to a belief that the developed nations were using environmental doomsday predictions as a racist device to keep the non-white third world at a relatively low level of development.[125]

The convening of a conference of scientists and development experts from the South at Founex, Switzerland in June, 1971 served to bring the developing nations on board in support of the Stockholm agenda.[126] The meeting at Founex "had a major impact in expanding the international environment agenda beyond concerns about conservation and pollution to wider issues including flows of development assistance, trade and development."[127] The integration of development and environment had not yet occurred but this linkage was inevitable once scientific research confirmed the serious nature of global environmental decline. Participants at Founex reported that "developing countries must view the relationship between development and environment in a different perspective. In their

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122. *Id.* at 53-54.
123. *Id.* at 55.
124. *Id.* at 135-136.
125. *Id.* at 47.
126. *Id.* at 48.
127. Summary Report of Canadian DEA, *supra* note 20, at 4.

context, development becomes essentially a cure for their major environmental problems."[128] This awareness that the developing world had a different set of priorities was to become central to the formulation of both the Stockholm and Rio Declarations. It was this consciousness of differing roles which made the creation of both bodies of principle a rather delicate balancing act. If the ultimate instruments were not completely satisfactory to anyone that in itself was a reflection of the level of compromise which had to be accepted for universal agreement.

The most serious apprehension of the South was that environmental concerns would impede development in the poor nations. Hence it was imperative to ensure that this did not happen. At Stockholm one way to ensure this was to keep on restating developing nation priorities. Hence, in the Stockholm Declaration, *environmental deficiencies* were attributed to *condition of underdevelopment.* (Principle 9). The requirements of developing nations for *stability of prices and adequate earnings for primary commodities and raw materials* were deemed *essential to environmental management.* (Principle 10). Most important was the following caution:

> *The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries.* (Stockholm Declaration, Principle 11) . . . *Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries.* (Stockholm Declaration, Principle 12)

Clearly, the Stockholm Declaration conceded much to the developing nation agenda in attempting to meet the apprehensions of these nations about the possible economic threat posed by Northern concerns about environmentalism.

At Rio, the process begun at Stockholm went even further. *Developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development* (Principle 7). The rich were put on notice to eliminate *unsustainable patterns of production and consumption* (Principle 8). The South has consistently stressed the fact that it is Northern wasteful processes which are leading to environmental degradation. This discussion was no less vehement at Rio than it was at Stockholm. Indeed by 1992, the Southern delegates were armed with twenty years of depressing statistics to demonstrate both that Stockholm measures had by and large failed and that the North had created even more environmental problems in the two decades between the conferences.

The success of the South in including its agenda into the Rio Declaration can be gauged by the extent of criticism levelled at the final prod-

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128. Founex Report, *cited in*, ROWLAND, *supra* note 26, at 49-50.

uct emerging from the long and bitter negotiating sessions which occurred over the creation of this body of principles. There was a clear feeling that environment had been subordinated to development.[129]

The South's apprehensions concerning its ability to keep up with Northern environmental standards and possible resulting discrimination if it failed to do so were, to some extent, palliated by recognition that:

> *Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.* (Rio Declaration, Principle 11)

This principle may be compared with its Stockholm predecessor which stated:

> *Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.* (Stockholm Declaration, Principle 23)

The South also insisted that *trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.* (Rio Declaration, Principle 12)

Finally, on this issue of development, from Stockholm to Rio, the world progressed from endorsing the essential need for development to accepting development as a human right.

> *Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.* (Stockholm Declaration, Principle 8)

At Rio nations agreed that:

> *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.* (Rio Declaration, Principle 3)

The version above was accepted after amendment of the draft sponsored by Pakistan and China which referred to the inalienable right to development of poor nations.[130]

Despite the criticism levelled often justifiably at the vagueness of the

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129. York & Rusk, *supra* note 16, at 3-4.
130. *Id.*

Rio Declaration, there can be no doubt that for the world's poorest and most dispossessed, it at least affords recognition that their present economic state of deprivation has not gone unnoticed by the world. Teatao Teannaki, President of the Republic of Kiribati, stated that he was "particularly pleased to note that recognition is given to special needs of the least developed and those most vulnerable to environmental problems."[131] In inching its way toward recognition of the validity of the human right to development (with environmental safeguards) the world has taken an initial step towards alleviation of the plight of millions alive today and millions more yet to be born.

XI. CONSERVATION

The Stockholm Declaration, in its rather lengthy preamble, expresses the concern which brought delegates from many nations to Sweden to deal with the problems of the environment:

> *The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.* (Stockholm Declaration, Preamble, ¶ 2)

Both Declarations have ambiguous, if well-intentioned principles which because of their vagueness appear to decline to the level of platitudes.

> *The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.* (Stockholm Declaration, Principle 2)

This principle is followed by an equally vague pronouncement:

> *The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved* (Stockholm Declaration, Principle 3)

and this rather nebulous principle:

> *The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.* (Stockholm Declaration, Principle 5)

Collectively these appear to be classic examples of United Nations "internationalese," a language of promises without commitments. It was left to the delegation of the United States to present the positive aspect of Principle 2 (above) in the Stockholm Declaration. The American delegate

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131. Teatao Teannaki, President of the Republic of Kiribati, Statement at United Nations Conference on the Environment and Development (June 13, 1992).

declared the provision to be of "notable importance."[132]

Realization of the weakness of these principles prompted the delegates at Rio to attempt to be more specific in terms of actions to be undertaken to achieve the Stockholm principles. This attempt was not successful:

> *States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem* (Rio Declaration, Principle 7),

and this provision:

> *[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.* (Rio Declaration, Principle 4)

The critical issue of conservation underlies all attempts at environmental improvement in every nation of the world. The failure of the Rio Declaration to produce a forthright pronouncement urging the world in the direction of conservation was a serious weakness. Conservation is undoubtedly the key to environmental success for the future. If we manage to conserve the earth's resources now, we can possibly progress towards the universally accepted goal of sustainable development.

XII. POLLUTER PAYS PRINCIPLE

One of the unforeseen results of the Industrial Revolution was the fact that the movement to produce and sell inexpensive manufactured goods to growing numbers of consumers implied that certain invisible costs of this revolution were borne by society as a whole. Minerals were often strip-mined and the earth destroyed in the frenzy to gain raw materials. Agricultural land was rapidly gobbled up by the ever-growing urban and suburban concrete jungles which became the norm in much of North America and Western Europe. Factories polluted the air and tainted the water. Frequently, they were situated next to rivers and lakes into which sewage was regularly dumped without much thought of future consequences. Municipal sewage systems were also constructed to dump raw waste into oceans. Eventually this decades-long activity caught up with Mankind. The realization then set in that industrialists in particular had made free use of air and water supplies to pollute and befoul them at no cost to themselves. These were hidden costs which the entire national community and eventually the entire planetary community would pay. As Ben Jackson comments:

> The stress on economic growth as the goal for development also fails to take account of the future impact of present actions. It places the emphasis on profitable living now without considering the

132. ROWLAND, *supra* note 26, at 100.

> price—environmentally (and therefore probably economically)—to be paid later. For many environmentalists the greatest weakness of the 'more growth' solution is its failure to anticipate the future threat to the environment.[133]

In terms of past actions which have resulted in pollution, the clean-up costs are staggering. "Estimates of the cost of remedial steps worldwide to overcome the effects of pollution range as high as U.S. $300 billion annually."[134] The implementation of an environment-oriented agenda worldwide will entail not merely clean-up of past problems but action to prevent future pollution. Prior to the Earth Summit, Maurice Strong suggested that the costs to implement the ambitious Rio program would amount to an annual sum of $625 billion, with approximately eighty per cent of the costs being borne by developing nations, supplemented by an annual sum of $125 billion from the developed nations. Strong explained that as development assistance already totalled approximately $55 billion, another $70 billion would be required.[135]

The irresponsible consumption of air and water has resulted in much of the damage which the world now has to remedy. However much nations may balk at Strong's figures, the harsh reality is that the world will pay for pollution, either now or later. The World Commission on Environment and Development explained the problem:

> Air and water have traditionally been regarded as 'free goods,' but the enormous costs to society of past and present pollution show that they are not free. The environmental costs of economic activity are not encountered until the assimilative capacity of the environment has been exceeded. Beyond that point, they cannot be avoided. They will be paid. The policy question is how and by whom they will be paid, not whether. Basically, there are only two ways. The costs can be 'externalized'—that is, transferred to various segments of the community in the form of damage costs to human health, property, and ecosystems. Or they can [be] 'internalized'—paid by the enterprise. The enterprise may invest in measures to prevent the damages and, if the market for its product allows, pass the costs along to the consumer. Or it may invest in measures to restore unavoidable damage—replanting forests, restocking fish, rehabilitating land after mining. Or it may compensate victims of health and property damage. In these cases too, the costs may be passed on to the consumer.[136]

A growing realization that costs must rise to pay for past pollution has been balanced with a determination to ensure that in future polluters and not entire populations bear the burden of their actions. As Ivan Head comments: "The age-old practices of discharging wastes into flowing streams, and fumes into the atmosphere to be blown away by prevailing

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133. JACKSON, *supra* note 91, at 180.

134. HEAD, *supra* note 92, at 91.

135. *Leader of Rio Conference Predicts Success*, *supra* note 5, at 3.

136. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 220-221.

winds, are now subject not just to criticism but, increasingly, to censure and judicial constraint."[137] The polluter pays principle is the logical consequence of such thinking. The aim of the policy is to force manufacturers to internalize environmental costs and transfer these to their prices of products.[138] Member countries of the Organization for Economic Cooperation and Development (OECD based in Paris) agreed in 1972, the year of the Stockholm Conference, to adhere to the "Polluter Pays Principle" (PPP) in their environmental policies.[139]

The success of incorporating environmental costs into product prices has been largely in the developed nations where industries have been able to afford conversion to safer methods of manufacture and where consumers have been able to afford the higher prices. The developing nations have not been as successful particularly with respect to their exports because environmental "costs continue to be borne entirely domestically, largely in the form of damage costs to human health, property, and ecosystems."[140] Nor is this situation seen as seriously dangerous by a number of developing nation governments.

At Stockholm, some developing nations demonstrated their unwillingness to shoulder the financial burden of environmentally unsafe production possibly because this would blunt their competitive edge in world trade. The idea that they could be compensated for trade losses was rejected by the leading developed nations like the United States, Canada and Britain.[141] "Developing nations . . . argued loud and long that to expect the indigents of the world to accept financial responsibility in environmental trade upsets, on exactly the same basis as the wealthy industrial nations, was not only unfair but palpably absurd. The developing nations had their backs to the wall as it was."[142] Given this defensive stance, it was almost inevitable that at Stockholm states emphasized that:

> *The environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organization with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.* (Stockholm Declaration, Principle 11)

Aside from a provision that *States shall co-operate to develop further the international law regarding liability and compensation for the vic-*

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137. HEAD, *supra* note 92, at 91.

138. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 221.

139. OECD, *Guiding Principles Concerning International Economic Aspects of Environmental Policies*, Council Recommendation C(72)128, Paris, May 26, 1972, *noted in* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 221.

140. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 83.

141. ROWLAND, *surpa* note 26, at 57.

142. *Id.*

tims of pollution, (Stockholm Declaration, Principle 22) there was no adherence to the Polluter Pays Principle in this instrument prepared in 1972.

By 1992, the mood had changed as the developing nations became increasingly aware of the hidden costs of their competitive trading edge in certain commodities and products. The social consequences were visible from Africa to Southeast Asia. Hence at Rio the following principle was adopted:

> *National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.* (Rio Declaration, Principle 16)

Delegates at Rio went further to prevent states from risking the environment and using the justification that there was scientific uncertainty about the dangers posed by their activities:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainly shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.* (Rio Declaration, Principle 15)

Whether or not these provisions will be implemented globally remains to be seen. Certainly, in the post-Rio process now underway, it is critical that world public opinion monitor potential polluters in every nation to ensure that the Polluter Pays Principle is implemented. Although nations are not legally bound by the principles of Rio, in this instance, the moral commitment might well be enforced by citizens whose vigilance may be the only way to ensure that all of society does not continue to suffer from the actions of a few.

XIII. PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPROVEMENT

Environmental improvement is unlike any other major issue because it demands the commitment and action of every man, woman and child on this planet. Because environmental decline is caused by people, the clean-up and prevention of pollution demand the active and continuing participation of citizens in every nation. Hence it is even more a people's issue than it is a governmental one. Although the restoration of major polluted sites requires government funding and action, the prevention of pollution involves a thoughtful consideration about the fate of the planet in each and every human being who inhabits it. Environmental consciousness has grown on this planet because of the dedication of thousands of men and women in every nation who have created, from a grass-roots beginning, a movement which is now global and which can now compel governments to act according to its aspirations. Delegates at Stockholm were

aware of the significance of the popular factor in raising environmental concerns:

> *To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future . . . . The Conference calls upon Governments and peoples to exert common effort for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.* (Stockholm Declaration, Preamble 7)

Environmentalism became a serious obligation for the individual:

> *Man bears a solemn responsibility to protect and improve the environment for present and future generations.* (Stockholm Declaration Principle 1)

This rather vague exhortation followed:

> *The just struggle of the peoples of all countries against pollution should be supported.* (Stockholm Declaration, Principle 6)

The most useful method specified was to be education about environmental concerns.

> *Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media . . . disseminate information of an educational nature, on the need to protect and improve the environment in order to enable man to develop in every respect.* (Stockholm Decree, Principle 19)

In the twenty years between the United Nations Conference on the Human Environment and the United Nations Conference on Environment and Development, the level of public involvement has escalated to the point at which governments appear to be led—some might say "dragged"—towards environmental consciousness by their populations. Even though the high-minded intentions of the Stockholm Conference did not materialize as successfully as delegates had hoped, the sheer scope of environmental enthusiasm was given a tremendous boost by the Conference. The level of popular support for the cause of averting planetary decline spawned its own growth industry in terms of volunteer non-governmental organizations devoted to environmental concerns, media attention to the topic, investigative reporting of governmental failures in safeguarding against pollution, and committees of concerned business men who became quickly aware of the need to cater to this growing phenomenon or be boycotted and financially destroyed by it. Prime Minister John Major of the

United Kingdom commented at UNCED on this dramatic development: "The environment is no longer the specialist concern of a few—it has become the vital interest of us all."[143]

The galvanized public support for the environmental cause has also been a direct consequence of the fact that governments have dragged their feet over their Stockholm commitments and the problems of global pollution have escalated to almost catastrophic levels. His Majesty the King of Sweden, addressing the opening of UNCED, emphasized this concern when he reminded delegates about the uneven progress following Stockholm's great promise: "There has been great environmental improvement on the local, national and regional levels, while the global threats are more serious than ever."[144] The recognition that environmental success—or what there was of it—was largely because of local initiative, also underscored the significance of involving the public in not only the debate but in the performance of environmental clean-up. At Rio delegates decided to forge a new global partnership

> *[w]ith the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people* . . . . (Rio Declaration, Preamble, ¶ 4)

There was clearly a recognition, brilliantly stated by Maurice Strong, that "the 'carrying capacity' of the Earth could only sustain present and future generations 'if it is matched by the caring capacity of its people and its leaders.' "[145] Accordingly, delegates included the following important principle in the Rio Declaration:

> *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.* (Rio Declaration, Principle 10)

It was important not merely to encourage public involvement. It was felt to be equally important to enable the people to gain information about environmental concerns from public authorities. There is a growing realization that governments might attempt to block public access to information about risks to health. The way in which the government of U.S.S.R. handled the Chernobyl disaster is only one of the more glaring and obvious examples of the manner in which governments seek instinctively to conceal rather than reveal their mistakes. "A secret Soviet decree prohibited doctors from diagnosing illnesses as radiation-induced."[146] Such cover-ups can, as occurred after the Chernobyl incident, have both

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143. John Major, Prime Minister of the United Kingdom, Statement at United Nations Conference on the Environment and Development (June 12, 1992).

144. His Majesty, the King of Sweden, Statement at United Nations Conference on Environment and Development (June 3, 1992).

145. Frank McDonald, *Compromises Produce Fragile Agreement at Earth Summit*, IRISH TIMES, June 15, 1992, at 1.

146. Lenssen, *supra* note 85.

national and international consequences. Probably, with that example in mind, at Rio delegates decided:

> *At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.* (Rio Declaration, Principle 10)

The mandatory tone of this provision makes it a prime example of the kind of language which should have been included throughout the Rio Declaration. It is in the forthright formulation of such provisions that the Rio Declaration moved the world in a progressive direction. Although the non-binding nature of this instrument poses some problems for any individual or group challenging secretiveness in a government, the very fact that this principle exists, in such strong language serves notice on governments that the new world order includes openness and free public access in matters of public interest. Had the entire declaration been formulated in such pungent tones, it could have "provided a vision of how the people of the world could survive together in the next century."[147]

The concept of a global partnership attracted considerable attention at Rio. The Indonesian delegate, Dr. Emil Salim made the point that the Rio Declaration "should . . . pave the way . . . to forge a new global partnership between nations and peoples, a partnership in which rights and obligations are equitably shared by all, a global partnership based on a renewed and improved division of labor between nations and an equally improved sharing of benefits and efforts between people."[148] The goal of the partnership would be sustainable development and proper management of the planet's resources.[149]

However worthwhile an exercise it may be, the framing of provisions about global partnership will not automatically guarantee success for the goals of environmentalism. As Vincent Perera, Sri Lanka's Minister of Environment and Parliamentary Affairs, explained, "UNCED . . . marks the establishment of the global partnership. But the test of the partnership is in its implementation."[150]

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147. GLOBE AND MAIL, June 15, 1992, at A8.

148. Dr. Emil Salim, State Minister for Population and the Environment of the Republic of Indonesia, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

149. K.K.S. Dadzie, Secretary-General of the United Nations Conference on Trade and Development, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

150. Vincent Perera, Sri Lanka's Minister of Environment and Parliamentary Affairs, Statement at United Nations Conference on the Environment and Development (June 3-14, 1992).

XIV. WAR AS A SOURCE OF ENVIRONMENTAL CONCERN

The environmental group Greenpeace produced a critique of the Rio Declaration in which it alleged that in the creation of the declaration substance became immaterial as the desire to write a text became the driving force.[151] Nowhere is this point more evident than in the provision about warfare. Twenty years earlier, delegates at Stockholm had agreed that:

> *Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.* (Stockholm Declaration, Principle 26)

Frank McDonald, writing in *The Irish Times*, commented: "Twenty years later, under pressure from the US which fought for the exclusion of all 'Stockholm-type language' on this issue,"[152] the Rio Declaration merely and mildly suggested that

> *Peace, development and environmental protection are interdependent and indivisible,* (Rio Declaration, Principle 25),

and that

> *Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.* (Rio Declaration, Principle 24)

States were also urged to

> *resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.* (Rio Declaration, Principle 26)

Greenpeace commented: "If this is progress, we are in deep, deep trouble."[153]

An old African proverb states that when two elephants fight, it's always the grass that gets hurt.[154] Although the existence of a nuclear deterrent kept the two superpowers, the United States and the Soviet Union, from direct confrontation during the Cold War, each superpower patronized a number of client states: smaller, often poor nations whose petty conflicts with neighboring countries escalated and became part of Cold War politics. Each superpower armed its client states and fought its Cold War rival to the last drop of blood shed by the men and women of developing nations. No region of the world was exempt from this war by proxy which became the norm during the Cold War, in Latin America,

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151. McDonald, *supra* note 14.
152. *Id.* at 7:5.
153. *Id.*
154. JACKSON, *supra* note 91, at 150.

the Middle East, Africa and Southeast Asia. Having a nuclear umbrella did not mean that there was less war and less misery in the world. War only became a game which rich nations played at the expense of poor countries. Between the Cold War years of 1945 and 1989, one hundred and twenty-seven wars were fought on this planet and "[a]ll but two of them have been in or between developing countries."[155] Occasionally, the superpower was itself dragged into the fray, as the United States was in Vietnam and the U.S.S.R. in Afghanistan.

> The decade of the 1980s may well be recorded as one of the most brutal in this or any other century. It was a decade of wars . . . . The decade just past has seen the lengthy slaughter of the Iraq-Iran War as well as bloody civil wars—many of them surrogate conflicts supported or sponsored by superpower champions—in Afghanistan, Angola, Cambodia, El Salvador, Ethiopia, Guatemala, Lebanon, Mozambique, Nicaragua, Peru, Philippines, Sri Lanka and Sudan. It is estimated that in all these wars the death count exceeded 4 million.[156]

Whether the wars were civil or regional or international, the price paid in terms of human life and environmental destruction was always severe. Growing realization of the direct and indirect costs of war prompted delegates to urge UNCED in the direction of denunciation, if not renunciation of warfare. Dr. Zvonimir Separovic, representing the new Republic of Croatia, told delegates that "[w]ar is highly detrimental to human wellbeing, to the human environment and development." He reminded delegates of the devastation war had caused in the former Yugoslav territory and urged the Earth Summit to consider the "aggressive nature of human behaviour expressed in violence against other human beings and the environment in the form of war." Indicating that his country's contribution to UNCED "is centred on the environmental impact of war," Dr. Separovic insisted that the Rio Declaration "include a condemnation of war and express concern for the irreparable consequences of war operations," as well as a call for "international action against a new kind of crime which might be called ecocide."[157]

Warfare also diverts the resources and funds of both developed and developing nations away from health, education and environmental clean-up—progressive, worthwhile avenues—to unproductive devastation which exacerbates human misery and environmental degradation. The World Commission on Environment and Development commented that "[c]ompetitive arms races breed insecurity among nations through spirals of reciprocal fears. Nations need to muster resources to combat environmental degradation and mass poverty. By misdirecting scarce resources,

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155. HEAD, *supra* note 92, at 6.

156. *Id.* at 116-117.

157. Dr. Zvonimir Separovic, Minister in the Government of the Republic of Croatia, Statement at United Nations Conference on the Environment and Development (June 10, 1992).

arms races contribute further to insecurity."[158] The amounts involved in military research, production and consumption, if directed to environmental and human concerns could have a dramatic and immediate impact. Approximate estimates would suggest that global military spending had already reached $1000 billion by 1986.[159] "Annual military spending is still greater than the combined income of half of humanity."[160]

Developing nations, where most of the wars and consequent death and environmental degradation occur, continue to divert increasing amounts of their scarce resources to the military. "Since 1960, developing countries have increased their military expenditures at a rate that is double the rise in per capita income. As a percentage of GNP, developing countries dedicate 1.6 per cent to health care, compared to 5.2 per cent to military expenditures."[161] In human terms, military expenditure and debt servicing in the developing world (according to UNICEF estimates), cost each family in those poor nations approximately four hundred dollars per year.[162] Weapons imports from the North cost developing countries approximately $39 billion per year.[163] "In 1988, military spending in poor countries totalled $145 billion."[164] By the time the World Commission on Environment and Development contributed to the debate on this and related issues, the global arms trade, much of it in the developing world, had consumed over three hundred billion dollars.[165] Though there was much wringing of hands over this situation and the consequent loss of resources for more productive uses, delegates at Rio were unable to agree on a firm principled stand against warfare and its consequences. With respect to this provision, the situation at Rio was clearly a regression from the formulation agreed to at Stockholm. It was left to a delegate from the Middle East - an area which has recently witnessed the horrors of environmental warfare to view the warfare provision in an optimistic light. Rashid Abdullah Al-Noaimi, Minister of Foreign Affairs of the United Arab Emirates, informed delegates at Rio that his nations welcomed the principle "enunciated in the Declaration . . . which calls upon states to respect the rules of international law which provide for the protection of the environment in times of armed conflict."[166] One can only hope that the type of environmental havoc wrought on the Persian Gulf by Saddam Hussein will not be repeated in other conflict-ridden parts of

158. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 297.

159. *Id.* at 306 n.14.

160. JACKSON, *supra* note 91, at 174.

161. HEAD, *supra* note 92, at 135.

162. UNICEF, THE STATE OF THE WORLD'S CHILDREN, *cited in* JACKSON, *supra* note 91, at 174.

163. HEAD, *supra* note 92, at 6.

164. JACKSON, *supra* note 91, at 174.

165. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 300.

166. Rashid Abdullah Al-Noaimi, Minister of Foreign Affairs of the United Arab Emirates, Statement at United Nations Conference on the Environment and Development (June 9, 1992).

the world.

XV. PROVISIONS UNIQUE TO THE STOCKHOLM DECLARATION

Although we have thus far compared and on occasion contrasted the principles which emerged from both environmental conferences, it is interesting to note the moments where the two documents diverge completely because these areas are also indicative of trends and tendencies of each era and also illustrative of particular weaknesses in the particular declaration which failed to enunciate those principles. The present analysis will concentrate on the principles themselves rather than the preambles.

A. *Oceanic Pollution*

The issue of oceanic pollution was considered at Stockholm and the following principle adopted:

> *States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.* (Stockholm Declaration, Principle 7)

Twenty years of oceanic pollution continued despite this high-minded principle. The issue of oceanic pollution is now so serious that it can be considered a global catastrophe in the making. There is hardly an ocean now which does not regularly receive sewage and waste. As Philip Elmer-Dewitt commented:

> Anyone who has been near the seashore lately—or listened to Jacques-Yves Cousteau on TV—knows that the oceans are a mess, littered with plastic and tar balls and rapidly losing fish. But the garbage dumps, the oil spills, the sewage discharges, the drift nets and factory ships are only the most visible problems. The real threats to the oceans, accounting for 70% to 80% of all maritime pollution, are the sediment and contaminants that flow into the seas from land-based sources- topsoil, fertilizers, pesticides and all manner of industrial wastes.[167]

The most apparent form of pollution in the world's oceans occurs when ships carrying oil run aground, an event which is happening with alarming frequency. Recently, the whole world is watched the horror of oil pouring from the wrecked tanker, the Liberian-registered Braer, which ran aground and crashed on January 5, 1993 on the southern tip of Mainland, the largest of the Shetland Islands, approximately one hundred and sixty kilometres north-east of Scotland.[168] The ship was carrying about

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167. Elmer-Dewitt, *supra* note 47, at 44.

168. Alan Freeman & Rheal Seguin, *Oil Spill Raises Concern in Canada*, GLOBE AND MAIL, Jan. 7, 1993, at 1, and Associated Press, *Scotland Counts Cost of Oil Spill to Envi-*

ninety-three million litres of oil on its journey from Norway to Canada. All this oil spilling into the ocean would be "twice the amount that was dumped when the Exxon Valdez hit a reef in Alaska on March 24, 1989."[169] Although these dramatic oil spills catch global attention, it also has to be remembered that oil pollution of the oceans goes on continuously. According to the United Nations, "about 600,000 tons of oil enter the oceans each year as a result of normal shipping operations."[170] It has also been estimated that about six and a half million tons of litter are cast into the world's oceans annually.[171]

There is no dearth of international agreements to protect the oceans. The Antartica Treaty signed in 1959 and a subsequent Agreement of 1991 protect that fragile region with regulation of waste disposal and marine pollution.[172] Best known of the plethora of treaties is the 1982 Law of the Sea Treaty which is "the product of more than a decade of often contentious negotiations."[173] Participating states are expected to control diverse sources of ocean pollution, "including discharges and runoff from cities and agriculture, ocean dumping of wastes, releases from boats, oil exploration and drilling, mining, and air pollution deposited in the ocean."[174] This controversy-dogged convention also requires "express prior approval by the coastal state for dumping in the territorial sea, in the EEZs [Exclusive Economic Zones], and onto the continental shelf . . . . States also have an obligation under the Law of the Sea to ensure that their activities do not injure the health and environment of neighbouring states and the commons."[175] A decade after its completion, the Law of the Sea Convention had still not entered into force because the implementation required ratification by sixty signatory nations. Environmentalists, like Hilary French, have suggested with respect to some provisions that "the position of the U.S. government was the biggest obstacle."[176] Despite this opposition, a number of the provisions of the convention have been accepted as customary international law and are implemented by various nations,[177] "with positive effects on fish stocks, ocean pollution, and freedom of the seas."[178]

Sixty-seven nations have signed on as contracting parties to the Con-

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ronment, GLOBE AND MAIL, Jan. 7, 1993, at A6.

169. Associated Press, *Scotland Counts Cost of Oil Spill to Environment*, GLOBE AND MAIL, Jan. 7, 1993, at A6.

170. Scott Stevens *et al.*, *Global Resources and Systems at Risk*, CHRISTIAN SCI. MONITOR, June 2, 1992, at 10.

171. Elmer-Dewitt, *supra* note 47, at 46.

172. FRENCH, *supra* note 110, at 156.

173. *Id.* at 158.

174. FRENCH, *supra* note 110, at 158 citing Douglas M. Johnston, *Marine Pollution Agreements: Successes and Problems*, *in* INTERNATIONAL ENVIRONMENTAL DIPLOMACY, (John E. Carroll ed., 1987).

175. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 272.

176. FRENCH, *supra* note 110, at 159.

177. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 274.

178. FRENCH, *supra* note 110, at 159.

vention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (more commonly referred to as the London Dumping Convention). This convention was established in 1972, the year of the Stockholm Conference, and entered into force in 1975.[179] The convention prohibited the dumping of radioactive and other forms of dangerous waste into the ocean. It now "outlaws dumping of all forms of industrial waste by 1995; a ban on ocean incineration of wastes is to take effect by the end of 1994."[180] Clearly, the post Stockholm process was not very successful in protecting the oceans from either deliberate dumping or accidental pollution. This is an area where very tough international law is called for, law which stiffens penalties and liabilities to such a point that shipping companies are deterred from using any but the most seaworthy ships. A very stringent regime of fines for deliberate polluters is one possible solution. Nations have to be made to abide by their pledge to uphold the London Dumping Convention. This commitment states that contracting parties will "take all practical steps to prevent pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[181] If the Braer disaster in Scotland increases public awareness, it could result in more "aggressive action to prevent oil spills, increase inspection of foreign ships and improve emergency preparedness."[182]

At the Rio Conference in 1992, there was awareness of the serious nature of global pollution of the oceans. Kinza Clodumar, Minister of Finance for the Republic of Nauru in the Central Pacific, called for "an immediate and permanent ban on the deliberate dumping of all toxic materials into the oceans, including especially radioactive wastes."[183] The delegate from Nauru reminded his colleagues at the Earth Summit that

> dumping at sea accounts for only a fraction of ocean pollution. Three fourths of ocean pollutants enter directly from land, either in runoff or through the air . . . . Ocean pollution from land based sources is an issue that is central to the health of the biosphere. The global community can ignore the issue only at its increasing peril.[184]

A delegate from a maritime nation thousands of miles from Nauru was similarly concerned. Thorbjorn Berntsen, Minister of Environment of Norway, emphasized the particular attention his nations has paid to degradation of the marine environment. He proposed the curbing of land based pollution, strengthening of rules and inspection routines applicable

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179. *Minister Praises Contribution of London Dumping Convention in Protecting Marine Environment*, British Information Services, Ottawa, Nov. 12, 1992.

180. FRENCH, *supra* note 110, at 156.

181. British Information Services, *supra* note 179.

182. Freeman & Seguin, *supra* note 168, at 1.

183. Kinza Clodumar, Minister of Finance, Republic of Nauru, Statement at United Nations Conference on the Environment and Development (June 9, 1992).

184. *Id.*

to global shipping and a permanent moratorium on ocean dumping of radioactive waste. The Norwegian delegate also pointed out that "contaminated nuclear production sites and potential runoff from more or less casually selected land based deposits represent a threat to the marine environment."[185] There was an evident and widespread interest in prohibiting ocean dumping and controlling the level of ocean pollution.

Unfortunately, this obvious level of concern did not translate into any specific recommendations which were incorporated into the Rio Declaration. There were no provision in that instrument which specifically addressed the issue of the oceans, although it could be argued that the various principles on transboundary pollution might be applicable. Given the seriousness and escalation of the problem, and despite the existence of several international treaties and the plea of the World Commission on Environment and Development ("the most significant initial action that nations can take in the interests of the oceans' threatened life-support system is to ratify the Law of the Sea Convention"[186]), inclusion of a precise formulation on the oceans in the Rio Declaration would have been not only appropriate but timely. In this very important matter, Rio demonstrated a regression from the stand taken at Stockholm.

To be fair to the delegates at Rio, the issue of the oceans does form an important chapter of the enormous document, Agenda 21.[187] In early April 1992, delegates attending the Fourth Session of the Preparatory Committee for UNCED "agreed to strengthen existing global agreements aimed at controlling land-based sources of marine pollution—fertilizers, pesticides, and the like, which account for more than two-thirds of ocean pollution. They have also agreed to improve collection of data on both marine resources and damage from pollution."[188] Simultaneously with the global meeting in Rio, a smaller group of delegates representing twenty-nine countries attended a Vessel Traffic Service symposium in Vancouver, Canada. The symposium addressed concerns and solutions for ship-source pollution. The remedies for this problem ranged from improved surveillance to enhanced management competence to better communications between nations.[189]

The necessity for inclusion of a provision specifically related to oceans in the Rio Declaration can hardly be underestimated. The declaration is likely to be the most widely-read of all the formulations to emerge from that enormous conference. If, as its creators hope, the declaration serves as an inspiration for future action, exclusion of the issue of the oceans cannot be justified.

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185. Statement by Thorbjorn Bernsten, Minister of Environment of Norway, UNCED, Rio, June 4, 1992.

186. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 274.

187. See Chapter 17, Agenda 21, United Nations Document, UNCED, Rio, 1992.

188. Stevens, *supra* note 170, at 10.

189. Alan Daniels, *Sea Summit Targets Polluters: 29 Nations Attending Vancouver*, VANCOUVER SUN, June 9, 1992, at D2.

> In the Earth's wheel of life, the oceans provide the balance. Covering over 70 per cent of the planet's surface, they play a critical role in maintaining its life-support systems, in moderating its climate, and in sustaining animals and plants, including minute, oxygen-producing phytoplankton. They provide protein, transportation, energy, employment, recreation, and other economic, social, and cultural activities.[190]

B. *Wildlife*

In *Earth in the Balance*, a thought-provoking analysis of the planet's environmental problems, Vice-President Al Gore commented that "we are creating a world that is hostile to wildness, that seems to prefer concrete to natural landscapes."[191] In creating and spreading our cement jungle civilizations, the human species has exhibited not merely its primacy in the biological scheme of things, but its capacity ruthlessly to destroy the natural habitat of countless thousands of species which share the Earth with us. Although environmental action plans propel us to clean and clear the air, atmosphere, water, and land which we have degraded, environmental awareness counsels us to remember the damage we do every day to these millions of large and small inhabitants of the planet whose very survival is unfortunately in our all-too callous hands. The ultimate ethic of environmental consciousness is to learn again to perceive ourselves not as the masters of the Earth but as one of its life forms. Our survival now depends on a merging of the actions, awareness, and consciousness implicit in a commitment to environmental goals.

At the Stockholm Conference, delegates pointed us in the right direction:

> *Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat which are now gravely imperilled by a combination of adverse factors. Nature conservation including wildlife must therefore receive importance in planning for economic development.* (Stockholm Declaration, Principle 4)

This significant principle had matured by the time the Earth Summit met at Rio, into an international treaty—the Convention on Biological Diversity[192]—which was signed and is currently being ratified by a number of nations. The concept of wildlife has also been enlarged to include life forms in their original pristine natural habitat and considerable attention is now being paid to the preservation of the homes of insects, animals and plants, not merely for idealistic purposes, but because some of the genetic material carried by these varied species could provide innumerable medical and scientific benefits for human use in the future. "We do not know, to within the nearest 20 million, how many species there

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190. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 262.

191. GORE, *supra* note 79, at 26.

192. *See* United Nations Document, "Convention on Biological Diversity," June 5, 1992, *reprinted in* 31 I.L.M. 818, 822 (1992).

really are on earth," comments Paul Harrison.[193] It is incumbent on the human species to ensure the survival of at least the majority of the estimated four to thirty million species.[194] Yet, "[t]here is a growing scientific consensus that species are disappearing at rates never before witnessed on the planet."[195] If we estimate the existence of about thirty million species today, we may annually be destroying about seventeen thousand five hundred of these life forms.[196]

The destruction of species is caused by a combination of human need and greed. The burgeoning human population is pushing into the natural habitats of other species, altering the environment so drastically that no other species can co-exist in the same space. In Kenya, the population is "pressing so hard on parks that protected land [a mere six percent of this territory] is steadily being lost to invading farmers."[197] As Mrs. Rahab Mwatha of the Greenbelt Movement in Kenya commented: "We are awakening to the fact that if Africa is dying it is because her environment has been plundered, overexploited, and neglected."[198] The rise in human population has generated extraordinary demands for food and has almost decimated the once abundant Atlantic fisheries off Newfoundland in the East of Canada. In Latin American and parts of Asia, deforestation, brought on by expanding population and the urge to develop, takes a daily toll in species extinction.[199]

It was realized at the Stockholm Conference that "protection of habitat is the single most effective means of conserving diversity,"[200] hence the mention of habitat in Principle 4 (above). Although nations can take credit for preparing and signing an international Convention on Biodiversity at the Earth Summit, it is significant to note that there was no provision pertaining to this all-important issue in the Rio Declaration. Given the ramifications and implications of the threat of species extinction which is occurring relentlessly every day, it might have been wise to lay emphasis on this matter in the Rio Declaration in order to bring it to public attention. The fact that there is now a treaty in existence and that numerous governments have signed it hardly solves the problem of the survival of species on this planet. The international convention is only an initial step in a very long process. The inclusion of a provision on biodiversity in the Rio Declaration could have served to popularize the con-

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193. PAUL HARRISON, THE THIRD REVOLUTION, ENVIRONMENT, POPULATION AND A SUSTAINABLE WORLD 59 (1992).

194. *Id.* at 59.

195. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 148.

196. *Caldicott*, *supra* note 71, at 96 *citing* Edward O. Wilson, *Threats to Biodiversity*, SCI. AM., Sept. 1989, 108-16.

197. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 153.

198. *Id.* at 154 (quoting statement from Mrs. Rahab W. Mwatha, *The Greenbelt Movement*, (WCED Public Hearing, Nairobi, Sept. 23, 1986)).

199. *See* John C. Ryan, *Conserving Biological Diversity*, *in* STATE OF THE WORLD 1992 (Linda Starke ed., 1992).

200. *Id.* at 24.

cept of species conservation and made it more of a people's issue than it is at the present time. The issue of biodiversity may be too specific for the general principles incorporated into the Rio Declaration. The primacy of the issue, however, and the fact that the declaration is a veritable hodge-podge of articles, some of which are more precise than others, would argue in favor of its inclusion.

While it could be suggested that the biodiversity treaty made the principle redundant, it is also important to remember that the Declarations at Stockholm and Rio are intended to serve as signposts for all the people of the planet. It would have been worthwhile in such an instrument to include an issue which is of crucial importance environmentally, economically, and in the long term for the survival of our human species as well. The existence of a binding treaty in international law ought not to preclude adherence to the general principle of species conservation in a document such as the Rio Declaration. It is likely that in future years, far more people will read the Rio Declaration than the treaty on Biodiversity. If the point of the Declaration was to inform, encourage and enthuse at the popular level, so important a feature of environmental concern ought to have been included with no prejudice to the legally binding commitments entered into by nations which signed the Biodiversity Convention.

XVI. PRINCIPLES UNIQUE TO THE RIO DECLARATION

A. *Women*

If international instruments can be considered a reflection of the times in which they are formulated, then the Rio Declaration bowed to the inevitable in recognizing the significance of women to society and to the environmental movement. The twenty years since Stockholm have witnessed the implementation in most areas of the developed world of the women's revolution with its resulting shift in attitudes among both men and women about their roles and importance in society. With this revolution has come a growing awareness of the injustice of the past treatment of women and a consequent determination to rectify that situation. Unfortunately, the improvement in the condition of women has been mixed, when the subject is viewed internationally. In developing countries, the poorer, uneducated women still suffer a life-long burden caused simply by their gender. Such burdens can range from female infanticide in China to occasional widow burnings in India. Garrick Utley of NBC television reported that recently in Somalia some women accused of adultery had been stoned to death.[201] Child marriage, lack of education, heavy domestic toil and often grinding physical farm labor are the fate of thousands of women around the world. It was therefore timely and fitting that delegates at the Earth Summit endorsed the following principle for inclusion in the Rio Declaration:

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201. Garrick Utley (NBC Evening News, Jan. 9, 1993).

> *Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.* (Rio Declaration, Principle 20)

There was widespread support for inclusion of a provision concerning women. Margaret Shields, Director of the United Nations Research and Training Institute for the Advancement of Women, reminded delegates at UNCED that:

> Women are not new to environmental concerns. They are the people who must walk further to collect fuel if an area is deforested. They are the people most affected by pollution of water supplies when they or their families become ill as a result. In rural areas, women are often placed at greatest risk from the use of dangerous products and not only women but also their infant and newborn children. Most important, women are the people who could make an essential contribution to any debate about the fundamental realities of environmental degradation. They are the ultimate consumers of environmental management decisions.[202]

The problems of women in developing nations were mentioned at Rio and in the process leading up to the Earth Summit but were not specifically addressed in the Rio Declaration. In 1986, Mrs. King, representing the Greenbelt Movement in Kenya, told the World Commission on Environment and Development that:

> women are responsible for between 60 to 90 percent of the food production, processing, and marketing. No one can really address the food crisis in Africa or many of the other crises that seem to exist here without addressing the question of women, and really seeing that women are participants in decision-making processes at the very basic all the way through up to the highest level.[203]

The role of women as a vital labor force in Latin America, Asia, and Africa[204] has long been recognized, but the rather vague formulation produced about women in the Rio Declaration failed to address this issue in any specific manner.

Given the amount of publicity and media attention generated by the Earth Summit, it would have been worthwhile to emphasize—if only for popular consumption—certain key areas of environmental and social concern with respect to women. This is probably why Princess Sonam Chhoden Wangchuck, representing the King of Bhutan at UNCED, em-

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202. Margaret Shields, Director, United Nations Research and Training Institute for the Advancement of Women, Statement at United Nations Conference on Environment and Development (June 9, 1992).

203. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 124 (quoting Statement from Mrs. King, *The Greenbelt Movement*, (WCED Public Hearing, Nairobi, Sept. 23, 1986)).

204. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 124-5.

phasized, "the recognition of the role of women, particularly rural women, in sustainable development is crucial as women are motivated by their primary concern to improve their families' quality of life." Pointing out that "too few women are involved in decision-making processes of environmental management and policy making," Princess Sonam Wangchuck expressed her delegation's view that "women's role in leadership and community-based participation must be vital components of sustainable development strategies."[205] The delegation from Thailand was headed by a Princess who is also a professor, Dr. Chulabhorn Mahidol. It was fitting that in her statement to UNCED she stressed that women "must play an equal partnership role in the integration of environment and development."[206]

In March 1992, British Overseas Development Minister, Lynda Chalker, called for a "change in attitudes towards women in developing countries," and indicated that this would be "a high priority in the British aid programme."[207] Thorbjorn Berntsen, Norway's Minister of Environment, proposed particular efforts to include women in decision making.[208]

Bella Abzug, Co-Chair Women's Environment and Development Organization, reported to the plenary at UNCED about the activities of women's groups at preparatory meetings, action which resulted in the inclusion of a principle about the role of women in the Rio Declaration. Ms. Abzug also emphasized the fact that UNCED's mandate directed Secretary-General Maurice Strong to "ensure that women's critical economic, social and environmental contributions to sustainable development be addressed . . . as a distinct cross-cutting issue in addition to being mainstreamed in all the substantive work and documentation."[209] It is quite apparent that the women's issue aroused international concern and interest.

Not everyone, however, was satisfied with the resulting principle which became part of the Rio Declaration. The Canadian Participatory Committee of Non-Government Agencies, which advised on the declaration was highly critical of the final document. With reference to the principle on women (quoted above), the Committee commented that "as writ-

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205. Her Royal Highness Princess Sonam Chhoden Wangchuck, Representative of the King of Bhutan, Statement at United Nations Conference on the Environment and Development (June 11, 1992).

206. Professor Dr. Her Royal Highness Princess Chulabhorn Mahidol, Personal Representative of the King of Thailand, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

207. Statement, Lynda Chalker, Overseas Development Minister, United Kingdom, British Information Services, Ottawa, Mar. 10, 1992.

208. Thorbjorn Berntsen, Minister of Environment for Norway, Statement at United Nations Conference on theEnvironment and Development (June 4, 1992).

209. Bella Abzug, Co-Chair Women's Environment and Development Organization, Statement at United Nations Conference on the Environment and Development (June 9, 1992).

ten, the principle is vacuous."[210] This is probably justified criticism, but in evaluating the progress from Stockholm to Rio, the existence of a reference to women's participation is illustrative of forward movement, however minimal the actual distance travelled.

B. *Indigenous People*

In a world of incredibly fast change and rapid destruction of the old in favor of the new, we have in the twenty years since Stockholm begun to realize both the value and the vulnerability of those groups whose preference is an alternate lifestyle more in tune with nature than the frenzied pace that industrialized civilization normally allows. The indigenous people of the world have suffered a cruel and undeserved fate at the relentless hands of majority cultures which have either victimized them by deliberate genocide or by economic deprivation. Indigenous people are

> found in North America, in Australia, in the Amazon Basin, in Central America, in the forests and hills of Asia, in the deserts of North Africa, and elsewhere . . . . The isolation of many such people has meant the preservation of a traditional way of life in close harmony with the natural environment. Their very survival has depended on their ecological awareness and adaptation. But their isolation has also meant that few of them have shared in national economic and social development; this may be reflected in their poor health, nutrition, and education.[211]

There is now a greater awareness of and sensitivity towards the needs of such cultures. It is now mainstream thinking in North America not to view them as obstacles to development, but to perceive them as important contributors to civilizational harmony. Indigenous people form part of the rich tapestry of human culture and in protecting their right to life and their cultural heritage, the world is finally recognizing its debt to its own past. At Rio, delegates endorsed the following principle:

> *Indigenous people and their communities, and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.* (Rio Declaration, Principle 22)

The United Nations has also proclaimed 1993 as the International Year for the World's Indigenous People.[212] However, despite the international action involved in formulating the universal declaration on indigenous rights,[213] tribal people continue to be slaughtered in countries like

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210. York & Rusk, *supra* note 16.

211. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 6, at 114.

212. *International Year of the World's Indigenous People*, U.N. GAOR, 45 Sess., Agenda Item 12, U.N. Doc. A/Res/45/164 (1991).

213. See United Nations Document, Agenda 21, Chapter 26.

Guatemala. Rigoberta Menchu, winner of the 1992 Nobel Peace Prize for her work on behalf of indigenous people in Guatemala, has revealed to the world the tragedy of her people: one hundred thousand have died in the past three decades and over forty thousand have vanished.[214] Indigenous people in a number of nations from Canada to India are agitating for recognition of their status, for an end to their marginalized existence at the outer perimeters of society. Realistically, indigenous leaders like Menchu admit: "I don't think we can have an indigenous nation, alone in the world, at the end of the 20th century."[215] However, it is now widely recognized that extinction is not their inevitable fate nor is it their only alternative. In recognizing the worth of groups which live harmoniously with nature, we are only belatedly admitting that "[t]he Aboriginal viewpoint corresponds closely with the ecological perspective."[216] As Richard Falk comments: "In a fundamental sense, indigenous peoples preserve and embody alternate life-styles that may provide models, inspiration, guidance in the essential work of world order redesign, an undertaking now primarily associated with overcoming self-destructive tendencies in the behaviour of modern societies."[217]

It is significant that the principle in the Rio Declaration is rather general and vague with respect to the role of indigenous peoples. States are not mandated to support nor to recognize them. The more mild word "should" is used. There is no mention of the inherent rights of indigenous people, nor is there any recognition of their right to political identity within the nation state. The committment (if it can be called that) is so ambiguous, that it is uncertain how states should support their identity, culture and interests. However, despite its obvious weakness, the provision carries the world a step forward from Stockholm in according international recognition to the world's indigenous people. "Perhaps ironically, the growth of modern communications and transportation has internationalized the struggle of indigenous peoples in the last decade or so."[218] Perhaps, there is now a growing consciousness that we must look to our indigenous roots to find alternate ways of living and create lifestyles which are sustainable and healthy for our planet. Time is running out for humanity. The indigenous people by their suffering serve to remind us about the fate of fragile life forms and by their resilience give us hope that all may not yet be lost. This point was dramatically made at UNCED by Ji Chaozhu, Under-Secretary-General of the United Nations Department of Economic and Social Development, who quoted from Native American Chief Seattle's statement of 1855: "Whatever happens to the

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214. Graham Fraser, *Nobel Peace Prize Opens Doors for Menchu*, GLOBE AND MAIL, Nov. 13, 1992, at A7.

215. *Id.* at A7.

216. Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, RIGHTS OF PEOPLES 23 (James Crawford ed., 1988).

217. *Id.*

218. *Id.* at 19.

earth, happens to the people of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself."[219]

XVII. CONCLUSION

After the intensive, often feisty negotiating sessions which resulted in the Rio Declaration, most delegates attempted to put a positive face on the result of their wrangling. Hans Alders, Minister of Environment of the Netherlands, commented:

> We see the Declaration as a sound basis for the much needed development of international law, and therefore endorse it as it stands. The Declaration not only reaffirms the Declaration of Stockholm, but it takes matters further, as indeed it should. New important elements in this Declaration are the principle of responsibility for future generations, the precautionary principle, the principle of informed participation in decision-making, the recognition of the rights of indigenous peoples and the importance of youth and the role of women in managing the environment. It is our task to ensure that these principles will be embodied in all future national and international legal and policy instruments.[220]

Not all delegates were willing to perceive progress from the brutal negotiating sessions which had preceded the final production of the declaration. Giorgio Ruffolo, Italy's Minister for Environment, admitted that he was not happy with some of the formulations in the Declaration.[221]

At the end, the environment/development conflict was evident in the way delegates perceived the final product of their deliberations. The South had fought hard to achieve a development-oriented declaration. The North, more fragmented and less unified than the developing nations, found its concept of an Earth Charter converted into a statement emphasizing the primacy of development in a number of provisions. This was precisely what the South wanted. As Dr. Emil Salim, Indonesia's State Minister for Population and the Environment, stated,

> [b]ecause the objectives of our Conference include both the environment and development, both aspects must be reflected in the Rio Declaration. Therefore, while affirming the responsibility to undertake global environmental action, the Declaration must also affirm the right of nations to pursue development. Only in this way will we be able to counter the destructive potential of environmental degradation

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219. Ji Chaozhu, United Nations Under-Secretary-General, Department of Economic and Social Development, Statement at United Nations Conference on Environment and Development (June 11, 1992). For a longer, slightly varied version of Chief Seattle's statement, see GORE, *supra* note 79, at 259.

220. Hans Alders, Minister for the Environment of the Netherlands, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

221. Giorgio Ruffolo, Minister of Environment for Italy, Statement at United Nations Conference on the Environment and Development (June 4, 1992).

> and the equally terrible potential of global social and political upheavals.[222]

The Rio Declaration did not satisfy all Southern nations. The Prime Minister of Malaysia, Dr. Mahathir Bin Mohamad, believed that it had been "watered down upon insistence from the powerful and the rich."[223]

For the North, there was much dissatisfaction with the Rio Declaration. In framing their initial concept for an Earth Charter, the Canadians sought inspiration from the Universal Declaration of Human Rights. "But with the watered-down Rio declaration, 'the visionaries came up against the lawyers and bureaucrats, and the lawyers and bureaucrats won.' "[224] The problem, as the Canadians saw it, was that developing nations "campaigned for a declaration that would have endorsed their right to develop with little environmental constraint, while blaming the rich for the world's environmental problems."[225] The Canadian Participatory Committee of Non-Government Agencies commented that "some of the principles are so gaseous as to dissolve upon examination."[226] The Austrian delegate was more optimistic. Ruth Feldgrill-Zankel, Austria's Minister of Environment, agreed that "it may appear deplorable that the Rio Declaration did not turn out to be an inspired and inspiring document comparable to the Universal Declaration of Human Rights." However, she felt "confident that we will all live to see the elaboration of a true Earth Charter. In the meantime, we consider the Rio Declaration as an important cornerstone and will give the serious consideration to it in our own decision making process."[227] Speaking on behalf of the European Community, Portugal's Minister of Environment, Carlos Borrego, acknowledged the fact that the Declaration contains "many important principles recognized for the first time at the global level," and stated that it reflected "in a balanced way the various interests and concerns both of developing and developed countries."[228] The fact that the Declaration drew fire from both North and South is indicative of the fact that it probably passed the test of a document reflecting true consensus. No one was totally happy with it but equally it was more or less acceptable to all nations. The delegate from Sri Lanka, Environment Minister Vincent Perera, suggested that developed nations ought to view the developing countries with "em-

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222. Dr. Emil Salim, State Minister for Population and the Environment of the Republic of Indonesia, Statement at United Nations Conference on the Environment and Developement (June 5, 1992).

223. Dr. Mahathir Bin Mohamad, Prime Minister of Malaysia, Statement at United Nations Conference on the Environment and Development (June 13, 1992).

224. York & Rusk, *supra* note 16.

225. *Id.*

226. *Id.*

227. Ruth Feldgrill-Zankel, Minister of Environment of Austria, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

228. Carlos Borrego, Minister of Environment and Natural Resources for Portugal, Statement at United Nations Conference on the Environment and Development (June 3, 1992).

pathy and understanding. Perhaps if they had done so during the preparatory process the lead up to UNCED would have been smoother and less tortuous."[229] Conceding that the Declaration had not lived up to expectations, the delegate from Nauru, Kinza Clodumar, saw the significance of "nations . . . for the first time sitting down together to consider collectively problems of environment and development at the global level."[230]

Although it appears at first glance to be a document geared to the Southern agenda, in a very real sense, most Northern nations achieved their major objectives in the Rio Declaration. The British hoped to enshrine as fundamental principles, the precautionary approach, the polluter pays principle, and the idea of public access to information.[231] This was largely achieved, albeit not in the stirring fluent language initially envisioned by the developed countries. The government of Sweden stressed the importance of the polluter pays principle, the precautionary approach and the responsibility of nations to ensure that internal activities do not endanger the environment of other countries.[232] Norway favored the polluter pays principle and an open and fair international trading system, and insisted that "environmental concerns must not be used as a pretext to introduce discriminatory trade practices."[233]

It was left to the Japanese to place the Rio Declaration in proper perspective by calling it a "significant first step in our efforts towards sustainable development."[234] Dr. Helmut Kohl, Chancellor of Germany, suggested that it was part of a solid foundation for further measures.[235] With an eye on the future, Portuguese Prime Minister Anibal Cavaco Silva proposed that "[t]he Rio Declaration will have to serve as a basis for the establishment of new relations between all parties concerned, whether public or private, which will, in a responsible manner, have to provide answers appropriate to the challenge facing us."[236] Nations were obviously already gearing to the post-Rio process even as the endless parade of dignitaries marched past the eyes of delegates and cameras from around the world. "The principles inscribed in the Rio Declaration will serve as benchmarks for future progress," stated Denmark's Minister

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229. Vincent Perera, Minister of Environment, Sri Lanka, Statement at United Nations Conference on the Environment and Development (June, 1992).

230. Kinza Clodumar, Minister of Finance for Republic of Nauru, Statement at United Nations Conference on Environment and Development (June 9, 1992).

231. *U.N. Conference on Environment and Development*, Foreign and Commonwealth Office (London) Issue 25/92 (June 29, 1992).

232. *Sweden: National Report to UNCED, 1992*, Ministry of the Environment, Sweden, 1991, 12.

233. Thorbjorn Berntsen, Minister of Environment of Norway, Statement at United Nations Conference on the Environment and Development (June 4, 1992).

234. Kiichi Miyazawa, Prime Minister of Japan, Address at United Nations Conference on the Environment and Development (June 13, 1992).

235. Helmut Kohl, Chancellor of the Federal Republic of Germany, Statement at United Nations Conference on the Environment and Development (June 12, 1992).

236. Anibal Cavaco Silva, Prime Minister of Portugal, Statement at United Nations Conference on the Environment and Development (June 12, 1992).

for the Environment.[237] Jordan's King Hussein urged nations to exert "greater efforts to perfect" the imperfect Summit agreements.[238] Singapore's Minister for the Environment, Dr. Ahmad Mattar, declared confidently that "the adoption of the Rio Declaration will bring about a new world ethic towards our living environment."[239]

Canada has taken the initiative in resuscitating the initial vision of an Earth Charter, a vision which had faded when the competing interests of North and South resulted in the somewhat disjointed body of principle which we have been examining. Canadian Prime Minister Brian Mulroney suggested that "the idea of an Earth Charter of environmental rights and responsibilities, which has slipped beyond our grasp at Rio, should be revived."[240] Mulroney proposed that an Earth Charter be completed by 1995, in time for the fiftieth anniversary of the United Nations.[241] The Canadian initiative would utilize the existing Rio Declaration as a basis for a "visionary 'Earth Charter' that would integrate these principles."[242] Speaking in Hull, Quebec during Environment Week 1992, the Canadian Prime Minister declared: "Just as the Helsinki Accords set a point of reference for human rights and responsibilities, so an Earth Charter would set benchmarks for environmental rights and responsibilities."[243] It will be interesting to see whether this Canadian initiative is implemented or whether it will fall victim as did the Stockholm and Rio Declarations to the national and financial priorities of Member States of the United Nations.

It is imperative that the process of formulating principles of international environmental law continue in years to come. There is an obvious need for environmental law to become part of the everyday consciousness of men, women and children around the world. Environmental regeneration cannot be accomplished without extensive public enthusiasm and participation. It is simply not a matter which can be left to governments. If anything, Stockholm and Rio both demonstrated that governments are often far behind their populations in terms of heightened awareness of the significance of this issue. By coming to Stockholm and Rio with the old baggage of national sovereignty and developing versus developed country conflicts, the bureaucrats and politicians ultimately betrayed the

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237. Per Stig Moller, Minister of Environment of Denmark, Statement at United Nations Conference on the Environment and Development (June 9, 1992).

238. His Majesty King Hussein I of Jordan, Statement at United Nations Conference on the Environment and Development (June 5, 1992).

239. Dr. Ahmad Mattar, Minister for the Environment, Singapore, Statement at United Nations Conference on the Environment and Development (June 11, 1992).

240. Brian Mulroney, Prime Minister of Canada, Statement at United Nations Conference on the Environment and Development (June 12, 1992).

241. *Id.*

242. *Canada and the Earth Summit: Achievements*, United Nations Conference on the Environment and Development, June 3-14, 1992.

243. Brian Mulroney, Prime Minister of Canada, Address at the Canadian Museum of Civilization, Hull, Quebec (June 1, 1992).

idealistic vision which ought to have been incorporated in both instruments of principle. Time alone will tell whether the people will be able to recapture the vision from the politicians and create an Earth Charter which will impel and enthuse all five and half billion of us to work to save this planet.

APPENDIX I

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

PREAMBLE

The United Nations Conference on Environment and Development,

HAVING MET at Rio de Janeiro from 3 to 14 June 1992,

REAFFIRMING the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm of 16 June 1972, and seeking to build upon it,

WITH THE GOAL of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

WORKING TOWARDS international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

RECOGNISING the integral and interdependent nature of the Earth, our home,

PROCLAIMS that:

PRINCIPLE 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

PRINCIPLE 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

PRINCIPLE 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

PRINCIPLE 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

PRINCIPLE 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

PRINCIPLE 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

PRINCIPLE 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

PRINCIPLE 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

PRINCIPLE 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

PRINCIPLE 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each indi-

vidual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

PRINCIPLE 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

PRINCIPLE 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.

Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

PRINCIPLE 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

PRINCIPLE 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

PRINCIPLE 15

In order to protect the environment, the precautionary approach

shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainly shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

PRINCIPLE 16

National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

PRINCIPLE 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

PRINCIPLE 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

PRINCIPLE 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

PRINCIPLE 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

PRINCIPLE 21

The creativity, ideals and courage of the youth of the world should be mobilised to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

PRINCIPLE 22

Indigenous people and their communities, and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and en-

able their effective participation in the achievement of sustainable development.

PRINCIPLE 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

PRINCIPLE 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

PRINCIPLE 25

Peace, development and environmental protection are interdependent and indivisible.

PRINCIPLE 26

States shall resolve all their environmental dispute peacefully and by appropriate means in accordance with the Charter of the United Nations.

PRINCIPLE 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

APPENDIX II

DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT

The United Nations Conference on the Human Environment,

Having met at Stockholm from 5 to 16 June 1972,

Having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,

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Proclaims that:

1. Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprece-

dented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.

2. The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.

4. In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap between themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development.

5. The natural growth of population continuously presents problems on the preservation of the environment, and adequate policies and measures should be adopted, as appropriate, to face these problems. Of all things in the world, people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability of man to improve the environment increases with each passing day.

6. A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are

broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind - a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.

7. To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

II

PRINCIPLES

States the common conviction that:

Principle 1

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating *apartheid*, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2

The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3

The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

Principle 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat which are now gravely imperilled by a combination of adverse factors. Nature conservation including wildlife must therefore receive importance in planning for economic development.

Principle 5

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

Principle 6

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.

Principle 7

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 8

Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 9

Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

Principle 10

For the developing countries, stability of prices and adequate earn-

ings for primary commodities and raw material are essential to environmental management since economic factors as well as ecological processes must be taken into account.

Principle 11

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Principle 12

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

Principle 13

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population.

Principle 14

Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect the environment.

Principle 15

Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned.

Principle 16

Demographic policies, which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned, should be applied in those regions where the rate of population growth or

excessive population concentrations are likely to have adverse effects on the environment or development, or where low population density may prevent improvement of the human environment and impede development.

Principle 17

Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with the view to enhancing environmental quality.

Principle 18

Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.

Principle 19

Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminate information of an educational nature, on the need to protect and improve the environment in order to enable man to develop in every respect.

Principle 20

Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially, the developing countries. In this connexion, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.

Principle 23

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Principle 24

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all sphere, in such a way that due account is taken of the sovereignty and interests of all states.

Principle 25

States shall ensure that international organizations play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment.

Principle 26

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

The Movement of Persons: The Practice of States in Central and Eastern Europe Since the 1989 Vienna CSCE

DANIEL C. TURACK*

I. INTRODUCTION

The February 7, 1992 Maastricht Treaty on European Union stipulates that it will enter into force on January 1, 1993 if all twelve member-states ratify the Treaty by the end of 1992. In June 1992, Denmark rejected the Treaty in a popular vote, while French voters approved it in September 1992. The Netherlands, Spain, Belgium, and Portugal are in the process of ratification by their respective parliaments. Discussions are still underway in the political structures of the remaining seven members. The Maastricht Treaty envisages a common immigration policy that will create important changes involving freedom of movement, a topic beyond the range of this article. However, all of the present European Economic Community members are also members of the Conference on Security and Co-operation in Europe (CSCE), and a common immigration policy for the twelve members of the projected European Union will affect the free movement of the citizenry of the other CSCE European members.

This article examines the CSCE commitments and especially the state practices of the Eastern European members and the Soviet Union before its disintegration.

II. THE CSCE PROCESS

Pursuant to the process established under the 1975 Helsinki Final Act,[1] the Conference on Security and Co-operation in Europe (CSCE) ended its Vienna follow-up meeting on January 19, 1989 with the adoption of a Concluding Document.[2] Both the Vienna Concluding Document and the earlier Madrid Concluding Document,[3] adopted at the Madrid

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1. All 33 of the European states, excluding Albania, plus Canada and the United States signed The Helsinki Final Act on August 1, 1975, *reprinted in* 14 I.L.M. 1293 (1975). *See generally* J. MARESCA, TO HELSINKI: THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1973-1975 (1987); HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD (Thomas Buergenthal ed., 1977).

2. The Vienna Concluding Document, *reprinted in* 10 HUM. RTS. L.J. 270 (1989). On the work of the Vienna Conference, *see* Hannes Tretter, *Human Rights in The Concluding Document of the Vienna Follow-up meeting of the Conference on Security and co-operation in Europe of January 15, 1989*, 10 HUM. RTS. L.J. 259 (1989).

3. The Madrid Concluding Document, *reprinted in* 22 I.L.M. 1398 (1983).

follow-up meeting[4] in 1983, contain language that has strengthened and added to the human rights commitments stated in the Helsinki Final Act, especially with respect to human contacts. In the so-called "Basket III," entitled Cooperation in Humanitarian and Other Fields, the Participating States undertake to implement and respect the principle "that everyone shall be free to leave any country, including his own, and to return to his country" in fulfillment of the Helsinki Final Act, and the Madrid and Vienna Concluding Documents. Today, the CSCE is a key vehicle at the forefront of shaping post-Cold War Europe.

The Vienna Concluding Document contains thirty-three paragraphs[5] concerning human contacts and freedom of movement. There is a positive commitment to find solutions to existing backlogs of human contacts cases within six months and specific time-frames for processing applications pertaining to travel abroad, family meetings, family reunification, and binational marriage. Exceptions to freedom of movement, such as national security, are to be treated as "exceptions" in practice, and not as the rule. All State laws and regulations concerning movement by persons within and between States are to be published and accessible. Secrecy issues concerning national security are not to be applied arbitrarily and are to be applied within strictly warranted time limits. Finally, individuals denied their travel rights may receive information concerning any administrative decisions and notice of judicial remedies against such decisions.

Political events during 1989 and 1990 brought a dramatic transformation in Eastern Europe with the collapse of Soviet Communism and a redrawing of the map of Europe. Geopolitical changes occurred in the autumn of 1989 and in 1990 that saw the fall of the Berlin Wall, the death knell of the communist regime in the German Democratic Republic, the disappearance of that State on October 3, 1990, and the "velvet revolution" in Czechoslovakia. The CSCE process continued with the Copenhagen Meeting on the Human Dimension during June 5-29, 1990. For the first time, Albania attended as an observer[6] when the thirty-five CSCE Participating States met.

In the preamble of the Document of the Copenhagen Meeting,[7] the

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4. On the Madrid Follow-Up Conference, *see generally, Essays on Human Rights in the Helsinki Process* (A. Bloed & P. Van Dijk, eds.,1985); J. SIZOO & R. TH. JURRJENS, CSCE DECISION-MAKING: THE MADRID EXPERIENCE (1984).

5. The Vienna Concluding Document, *supra* note 2, at 282-286.

6. Observer status was requested by Albania, Estonia, Latvia and Lithuania but only Albania was accorded observer status. *See* Erika Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972-1990*, 12 HUM. RTS. L.J. 221, 226-228 (1991).

7. The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, *reprinted in* 29 I.L.M. 1305 (1990); 11 HUM. RTS. L.J. 232 (1990); 8 NETHERLANDS Q. HUM. RTS. 302 (1990). For a discussion on this meeting see Thomas Buergenthal, *The Copenhagen CSCE Meeting: A New Public Order For Europe*, 11 HUM. RTS. L.J. 217(1990); Bloed, *Successful Meeting of the Conference on the Human Dimension of*

"participating states welcome with great satisfaction the fundamental political changes that have occurred in Europe. . . ." They recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms. . . ." The Participating States reaffirmed that "they will respect the right of everyone to leave any country, including his own, and to return to his country. . . ."[8] So dramatic were the political events in Europe during 1989 and 1990 and the democratization of Eastern Europe that the heads of the Participating States decided to convene a second summit[9] of the CSCE process in Paris during November 19-21, 1990. It was not a meeting at the highest level envisaged by the Helsinki Final Act or in the previous CSCE decision. The fruit of the Paris Summit was the signing of the Charter of Paris for a New Europe.[10]

The preamble of the Charter acknowledges that the assemblage was "at a time of profound change and historic expectations." It recognizes that "the ideas of the Helsinki Final Act have opened a new area of democracy, peace, and unity in Europe. Ours is a time for fulfilling the hopes and expectations our peoples have cherished for decades: steadfast commitment to democracy based on human rights and fundamental freedoms. . . ."[11]

Under the sub-heading of "Human Rights, Democracy and Rule of Law," the signatories "affirm without discrimination, every individual has the right to . . . freedom of movement. . . ."[12] In the section entitled "Guidelines for the Future," under the sub-heading "Human Dimensions," the Charter reiterates that "[i]n accordance with our CSCE commitments, we stress that freedom of movement and contacts among our citizens . . . are crucial for the maintenance and development of free societies and flourishing cultures. We welcome increased tourism and visits among our countries."[13]

Both under the section of the Charter creating "New Structures and institutions of the CSCE Process" and in the Supplementary Document

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CSCE, 8 NETHERLANDS Q. HUM. RTS. 235 (1990).

8. *See generally* HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE (1987).

9. The Heads of State or Governments of the 35 Participating States attended and signed the Final Act at Helsinki in 1975. The unification of the two German States was based on the Treaty on the Unification of Germany, August 31, 1990, which entered into force on October 3, 1990, *reprinted in* 30 I.L.M. 457(1991); the Treaty on the Final Settlement with Respect to Germany signed on Sept. 12, 1990, *reprinted in* 29 I.L.M. 1186 (1990) and entered into force on March 4, 1991, with the ratification by the last signatory, the Soviet Union.

10. The Charter For a New Europe And Supplementary Document, *reprinted in* 30 I.L.M. 193 (1991). For a comment on the Charter, *see* Stephen Roth, *The CSCE "Charter of Paris For A New Europe": A New Chapter In the Helsinki Process*, 11 HUM. RTS. L.J. 373 (1990).

11. 30 I.L.M. 193 (1991).

12. *Id.* at 193-194.

13. *Id.* at 199-200.

to the Charter, the signatories undertook to have follow-up meetings every two years, as a rule, to take stock of developments, to review implementation of the commitments, and to consider further steps in the CSCE process.[14]

The Moscow meeting of the Conference on the Human Dimension of the CSCE took place between September 10 and October 4, 1991, with all thirty-eight States participating. Two innovations appear in the Concluding Document. One is the statement that "[t]he States taking part emphasize that questions of human rights, basic freedoms, democracy and the rule of law are a matter of international concern." Innovative in this statement is that "democracy" and "rule of law" are mentioned in juxtaposition to "human rights" and "basic freedoms." The second innovative statement is the observation that "the obligations adopted in matters concerning the human dimension in the CSCE are not exclusively an internal affair of the State concerned."[15] Hence, a CSCE State that infringes upon human rights can expect other CSCE States to get involved in what formerly had been claimed as a matter of internal affairs.

III. STATE PRACTICE

Only the highlights of state practice involving international travel will be addressed here. The German Democratic Republic (G.D.R.) ceased to exist as an independent State on October 3, 1990 through unification[16] with the Federal Republic of Germany. As a result, no attempt will be made in this article to recount the historic events that impacted freedom of movement in the G.D.R.[17]

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14. *Id.* at 207. The next Follow-up CSCE Conference was to open in Helsinki on March 24, 1992.

15. GERMAN TRIBUNE, Oct. 20, 1991, at 1.

16. The Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, signed by the Federal Republic of Germany, the German Democratic Republic, France, the Soviet Union, the United States and the United Kingdom, *reprinted in* 29 I.L.M. 1186 (1990).

For the legal and historical processes involved in German Reunification, see Albrecht Randelzhofer, *German Unification: Constitutional And International Implications*, 13 MICH. J. INT'L L. 122 (1991); Ryszaro W. Piotrowicz, *The Arithmetic of German Unification: Three Into One Does Go*, 40 INT'L & COMP. L.Q. 635 (1991); Gregory V.S. McCurdy, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U. J. INT'L L. & POL. 253 (1990); Frans G. Von Der Dunk & Peter H. Kooijmans, *The Unification of Germany and International Law*, 12 MICH. J. INT'L L. 510 (1991); Jochen Frowein, *The Reunification of Germany*, 86 AM. U. J. INT'L L. & POL'Y 152 (1992); Wilms, *The Legal Status of Berlin after the Fall of the Wall and German Reunification*, 51 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht* 470 (1991); Jochen Frowein, *German Revisited, id.*, at 333; Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT'L L. 18 (1991); Kearley, *German Division and Reunification, 1944-1990: An Overview via the Documents*, 84 L. LIBR. J. 1 (1992).

17. On September 10, 1989, the Government of Hungary, defying its 1967 agreement to prevent G.D.R. citizens from traveling to the West without authorization, allowed East Germans to head West. William Doerner, *Freedom Train; As Thousands of its Citizens Flee to West, East Germany Celebrates a Bitter 40th Birthday*, TIME, Oct. 16, 1989, at 38.

The democratization process in the formerly communist Eastern European States and the former Soviet Union has caused the nationals of these States to seek asylum[18] in other States. This has, in turn, spawned new problems for the potential countries of asylum. These countries have created legal barriers to prevent "economic refugees" from entering their territories. Issues pertaining to asylum will not be addressed in this article.

A. *Albania*

Albania was the most restrictive European communist country. The ordinary Albanian citizen was prevented from travel outside the country from the time it became a Communist State in 1944. It finally began to extricate itself from long isolation on May 8, 1990 when it announced a series of new laws as part of a liberalization plan, including a law stating that any Albanian has the right to a passport for foreign travel.[19]

In early July 1990, thousands of Albanians sought asylum in nine embassies in Tirana, Albania's capital.[20] Within a week the United Nations worked out an agreement for the evacuation of more than 6,000 asylees to leave the country.[21] By early November, more than 25,000 Albanians had left the country legally, essentially for foreign travel but realistically with-

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The mass exodus gathered momentum and led to the East German Government decision to open the Berlin Wall on Nov. 9th, but this dramatic gesture was too late to stem the desire of all Germans in both countries to unite. On the exercise of the right to travel by G.D.R. citizens, see T. Magstadt, *Ethics and Emigration: The East German Exodus*, 1989 (Carnegie Council on Ethics and International Affairs, 1990); John A. Zohlman IV, *The German Question of Reunification: An Historical and Legal Analysis of the Division of Germany and the 1989 Reform Movement in the German Democratic Republic*, 8 DICK. J. INT'L L. 291, 307-311 (1990).

18. *See As Ethnic Albanians Join the Exodus Greeks are Appealing for Help*, N.Y. TIMES, Jan. 22, 1991, at A6; Celestine Bohlen, *Europeans Confer on Emigration Limits*, N.Y. TIMES, Jan. 27, 1991, Sec. 1, at 9; Paul Lewis, *As Soviet Borders Open, the West Braces for an Economic Exodus*, N.Y. TIMES, Feb. 10, 1991, at D4; Kate Holder & Rebecca Brown, *Refugees From East Unsettle West*, CHRISTIAN SCIENCE MONITOR, Mar. 28, 1991, at 18; *New, Stricter Asylum Ordinance takes effect July 1, The Week in Germany*, July 5, 1991, at 6; Alan Riding, France Unveils Strict New Rules on Immigration, N.Y. TIMES, July 11, 1991, at A5; *British Information Service, "Political Asylum,"* 21 SURV. OF CURRENT AFF. 247 (July 1991).

19. *See* David Binder, *Albania Dropping Curbs On Worship And Ban On Travel*, N.Y. TIMES, May 10, 1990, at A1.

20. N.Y. TIMES, July 4, 1990, at A7 and July 5, 1990, at A10. The European Community called on the Albanian Government to allow those seeking asylum safe passage out of the country; N.Y. TIMES, July 6, 1990, at A48; N.Y. TIMES, July 7, 1990, at A1. The number of Albanians crowded into the embassies was now estimated at 3,000-5,000, N.Y. TIMES, July 8, 1990, at A5. The first group of Albanians allowed to leave the country were flown to Czechoslovakia, *see* N.Y. TIMES, July 10, 1990, at A1; Burton Bollag, *51 Albanian Refugees Recall Repression and Hope of Asylum*, N.Y. TIMES, July 12, 1990, at A12.

21. *See* Paul Lewis, *U.N. Said to Be Near Deal For Exit of 6,000 Albanians*, N.Y. TIMES, July 11, 1990, at A8; Clyde Haberman, *To Albanians, 'Ciao Italia!' Means Haven*, N.Y. TIMES, July 14, 1990, at A1.

out any intention of returning.[22] Before the year's end, hundreds of ethnic Greek-Albanians illegally crossed into Greece seeking political refuge.[23] The first two days of the new year only saw an increase in the number of Albanians pouring into Greece along the 100-mile common border.[24] As a result, the Greek Prime Minister had to declare a state of emergency in the border area.[25]

Meanwhile, Yugoslavia, which had given asylum to more than 1,000 Albanians in 1990, decided to discontinue its policy and forcibly handed over asylum seekers to Albanian authorities to face imprisonment for illegally leaving their country.[26] With Yugoslavia and Greece being less than receptive to potential Albanian illegal emigres, attempts were made to leave illegally to Italy in February 1991.[27]

A new wave of mass flight to Italy, Greece, and Yugoslavia began on March 4, 1991. By the week's end, an estimated 20,000 Albanians had reached Italy.[28] In an attempt to stem the tide of illegal emigration, the President of Albania imposed martial law in the country's ports[29] and introduced democratic political changes. Subsequently, Italy pledged about

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22. *See* David Binder, *In Albania, Communist Stronghold, The Grip Appears to Be Loosening*, N.Y. TIMES, Nov. 5, 1990, at A8.

23. *See* N.Y. TIMES, Jan. 1, 1991, at 4.

24. *See Thousands of Albanians Flee to Greece*, N.Y. TIMES, Jan. 2, 1991, at A3.

25. *See* Paul Anastasi, *Athens Is Alarmed Over Refugees From Albania*, N.Y. TIMES, Jan. 3, 1991, at A3; Paul Anastasi, *Albanians Still Stream Into Greece Though Athens Asks Them to Stop*, N.Y. TIMES, Jan. 4, 1991, at A3; Paul Anastasi, *Albanians in Greece Vow No Return*, N.Y. TIMES, Jan. 5, 1991, at A3. The Greek Prime Minister attempted to secure an amnesty from the Albanian Government to the refugees who would return to ease the problem but Albania initially refused, *see* Paul Anastasi, *Greek-Albanian Talks Stall Over Ethnic-Minority Issue*, N.Y. TIMES, Jan. 14, 1991, at A5. The next day an agreement was announced for the amnesty as well as an Albanian commitment to allow its ethnic Greeks to visit Greece. Many of the ethnic Greeks then used that agreement to leave the country permanently, as they distrusted their government, see Paul Anastasi, *Athens Chief Is Cheered by Greeks in Albania*, N.Y. TIMES, Jan. 15, 1991, at A5; N.Y. TIMES, Jan. 22, 1991, at A6.

26. *See* Chuck Sudetic, *Yugoslavia Returns 368 Escapees To Albania*, N.Y. TIMES, Feb. 7, 1991, at A11.

27. *See Albanians' Efforts to Flee Sets Off Clash*, N.Y. TIMES, Feb. 10, 1991 at A3.

28. *See* David Binder, *Thousands of Albanians Flee Aboard Ship To Italy*, N.Y. TIMES, Mar. 7, 1991, at A5; David Binder, *Albania Combating Exodus, Clamps Down on a Port*, N.Y. TIMES, Mar. 8, 1991, at A2; Brenda Fowler, *Albanian Refugees Taken to Shelters*, N.Y. TIMES, Mar. 9, 1991, at A3.

29. David Binder, *4 Albanians Die as Police Seize Refugee Ship*, N.Y. TIMES, Mar. 11, 1991, at A5. Some 1,500 Albanians were convinced to return when Italy received Albanian assurance that the returnees would not be persecuted. *Id.* The Albanian Government sought to change its image by becoming more democratic. Moves such as restoration of diplomatic relations with the United States after a 52-year gap and the call for multiparty elections at the end of March were to give Albanians more of an incentive to remain home. *See* David Binder, *U.S. and Albania to Restore Full Links*, N.Y. TIMES, Mar. 13, 1991, at A3. *See also*, *Albania Releases Prisoners But the Dispute Continues*, N.Y. TIMES, Mar. 16, 1991, at A3; David Binder, *Albania Turns In the Throes Of Transition*, N.Y. TIMES; Mar. 25, 1991, at A10; David Binder, *2 Freed Albanian Prisoners Tell of Others Left Behind*, N.Y. TIMES, Mar. 26, 1991, at A6.

$50 million in emergency aid to Albania to help cut the number of Albanians fleeing to its shores.[30]

However, in August 1991, another wave of over 18,000 desperate Albanians landed in Bari, Italy seeking refuge. Initially, Italy was prepared to allow about 1,000 Albanians to stay if they qualified for political asylum, while the others were forced to return to their homeland. Ultimately, even those given temporary sanctuary were deported.[31]

Other changes in Albania allowed most of the Albanian Jewish community to emigrate to Israel.[32] In addition, Albania was accepted into CSCE membership on June 19, 1991.

B. *Bulgaria*

Bulgarian repression of its Muslim minority of Turkish descent began in its assimilation campaign during 1984 and accelerated in May 1989, when the government's intimidation and religious repression forced an exodus of Muslims into Turkey.[33] By the end of June, some 70,000 ethnic Turks were deported from Bulgaria into Turkey.[34] Subsequently, the ethnic Turks were no longer expelled but for the most part were encouraged to leave and were issued passports valid only for travel to Turkey. The Turkish Government indicated a willingness to accept all of the estimated 1.5 million Bulgarian Turks.[35] On August 21, after receiving

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30. *See Italy Pledges $50 Million in Aid for Albania*, N.Y. TIMES, June 14, 1991, at A10. Thereafter, Albanian asylum seekers were returned to their homeland. *See* N.Y. TIMES, June 17, 1991, at A6.

31. *See* Clyde Haberman, *Italy Moves to Stern Wave of Albanians*, N.Y. TIMES, Aug. 9, 1991, at A3; Alan Cowell, *Italy Starts to Turn Back Albanian Wave*, N.Y. TIMES, Aug. 10, 1991, at A3; Alan Cowell, *Italy's Handling of Albanian Refugees Is Drawing Criticism*; N.Y. TIMES, Aug. 12, 1991, at A5; *For Many Albanians, Freedom Means a Shot at Leaving Forever*, N.Y. TIMES, Aug. 18, 1991, at D6.

The Italian Government announced that it would provide emergency food and economic aid to help feed the Albanian population and rejuvenate Albanian industry; *Albanians Plead for Food*, THE TORONTO STAR, Aug. 13, 1991, at A10; Andrew Mitrovica, *Why Albanians are Fleeing Land They Love*, THE TORONTO STAR, Aug. 14, 1991, at A21; *Ferryboat with Italian Relief Arrives in an Albanian Port*, N.Y. TIMES, Sept. 19, 1991, at A13.

32. *See* Wendy Kamm, *Joyful Jews From 'Another Planet' Called Albania*, N.Y. TIMES, April 11, 1991, at A4.

33. *See* Clyde Haberman, *Bulgaria Forces Turkish Exodus of Thousands*, N.Y. TIMES, June 22, 1989, at A1. At an earlier date, the U.S. Congress was aware of the oppression of the Turkish minority in Bulgaria. *See Implementation of the Helsinki Accords, Part I: National Minorities In Eastern Europe, The Turkish Minority in Bulgaria, Hearing before the Commission on Security and Cooperation in Europe*, 100th Cong. 1st Sess. (1987). A full account of the Bulgarian repression is found in K.H. KARPAT, THE TURKS OF BULGARIA (1991).

34. *See* Sam Cohen, *Turkey Starts Diplomatic Offensive*, CHRISTIAN SCIENCE MONITOR, June 28, 1989, at 3.

35. *See* Ted Zang, Jr., *Bulgaria's Persecution of the Turks*, CHRISTIAN SCIENCE MONITOR, July 24, 1989, at 18; Clyde Haberman, *Flow of Turks Leaving Bulgaria Swells to Hundreds of Thousands*, N.Y. TIMES, Aug. 15, 1989, at A1. Those of draft age and tobacco growers were not allowed to leave. Currency restrictions and the amount of property that could

about 310,000 Bulgarian Turks, Turkey announced a reversal of its policy and refused to admit any more Bulgarians without a Turkish visa. Previously, Turkey had waived its visa requirement, and the Bulgarian Government insisted that it was not expelling anyone since those leaving were issued three-month tourist visas.[36]

On September 1, 1989, a new Bulgarian passport law came into force that enabled Bulgarian citizens the right to obtain a passport valid for five years and granted amnesty to those who left the country illegally, though an exit visa was required.[37] On April 6, 1990, Yugoslavia imposed a new entry fee on all Eastern Europeans who sought entry for reasons other than business or package tours, thus requiring $200 worth of Yugoslav dinars in any hard currency. The Bucharest Government immediately retaliated with its own $200 currency purchase requirement for non-official Yugoslav travelers.[38]

An amendment to the passport law on January 9, 1991 provided that exit visas were no longer required for Bulgarians wishing to visit 'non-socialist' countries. No reference was made concerning whether those who left without a visa after September 1, 1989 or who overstayed their visa after that date were granted amnesty from the fines associated with those travel offenses.[39] On January 22, 1991, President Bush announced that he received the necessary assurance from Bulgaria regarding its emigration policy and waived the Jackson-Vanik Amendment.[40]

C. *Czechoslovakia*

After East Germany opened its borders to permit G.D.R. citizens to travel freely to the West, Czechoslovakia announced on November 14, 1989 that it would no longer require exit visas at the end of the year[41] for

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be taken out of Bulgaria meant that they arrived in Turkey almost destitute.

36. *See* Clyde Haberman, *Turkey Closing Borders to Refugees From Bulgaria*, N.Y. TIMES, Aug. 22, 1989,at A9; Sam Cohen, *Border Closing Stirs Criticism*, CHRISTIAN SCIENCE MONITOR, Aug. 29, 1989, at 4; Clyde Haberman, *Bulgarian Turks: Finding Disillusion with Exodus*, N.Y. TIMES, Sept. 19, 1989, at A12. By mid-September, approximately 10,000 of those who left returned to Bulgaria due to lack of housing and/or employment in Turkey.

37. *See Questions and Answers - An Occasional Series of Country Reports: Bulgaria: The Impact of Reform*; 3 INT'L J. REFUGEE L. 288, 296 (1991) [hereinafter *Questions and Answers*].

38. *See* David Binder, *Waves of Emigration Are Washing Over Europe*, N.Y. TIMES, June 3, 1990, at A10.

39. *Questions and Answers, supra* note 37, at 297.

40. 27 WKLY. COMP. PRES. DOC. 841 (July 1, 1991). A further extension was announced on June 3, 1991; *see* Thomas L. Friedman, *Bush Clears Soviet Trade and Weighs Role in London Talks*, N.Y. TIMES, June 4, 1991, at A1. On April 22, 1991, the United States and Bulgaria signed an Agreement on Trade Relations that provided for nondiscriminatory tariff treatment. The Agreement went into operation by Proclamation 6307 on June 24, 1991. 27 WKLY. COMP. PRES. DOC. 840 (July 1, 1991).

41. *See* R.W. Apple Jr., *Prague Loosens Restrictions on Travel*, N.Y. TIMES, Nov. 15, 1989, at A13. Two years earlier, the Czechoslovakian Government relaxed hard currency restrictions to allow its citizens to keep foreign currency in bank accounts earmarked for

its citizens to travel to the West. At the end of the month, the Government announced that it would begin the immediate removal of fortifications along its 240 mile border with Austria and remove virtually all restrictions on travel to the West. Consequently, the only obstacle to travel was the inability to convert sufficient currency into Western money.[42] In addition, the passport application procedure was simplified.

At the beginning of January 1990, a new law was adopted eliminating all emigration restrictions of the previous regime. On February 20, 1990, President Bush, satisfied with Czechoslovakia's emigration policies, waived the Jackson-Vanik Amendment to the Trade Act of 1974.[43] In July, Czechoslovakia and the Federal Republic of Germany abolished visa and currency exchange requirements between their countries.[44] However, at the end of October 1990, thousands of Romanians, Bulgarians, and other refugees became stranded in Czechoslovakia when Western governments stopped accepting them as refugees due to the liberalization of their countries' governments.[45]

The United States eventually granted temporary most-favored-nation trading status to Czechoslovakia in November 1990. This status became permanent on December 4, 1991.[46]

During 1991, points along the German-Czech border were used frequently to bring illegal immigrants to the West.[47]

D. *Hungary*

On March 14, 1989, Hungary became the first East Bloc country to

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foreign travel and the funds could be withdrawn without special application. Only a few days earlier more than 8,000 Czechoslovaks were allowed to travel to the Vatican for the canonization of Agnes Premyslide. Since Czechoslovaks were able to obtain visas to the West since 1988, the new gesture may have been an attempt by the leadership to remain in power.

42. *See* Henry Kamm, *Prague To Scrap Its Fortifiations on Austria Border*, N.Y. TIMES, Dec. 1, 1989, at A1. Just after the new year, the Czechoslovakian Government required Western visitors to exchange a minimum of $15 a day at artificially high rates.

43. Exec. Order 12,702, *reprinted in* 26 WEEKLY COMP PRES. DOC. 276 (Feb. 20, 1990). The waiver was continued on June 8, 1990, when President Bush informed Congress that potential emigrants from Czechoslovakia only need a valid passport and a foreign immigrant visa. Passports were issued routinely for travel to all countries and an exit visa was no longer required to travel. Also all bilateral family reunification cases were resolved. 26 WEEKLY COMP. PRES. DOC. 895 (June 11, 1990).

44. *The Week in Germany*, July 6, 1990, at 6.

45. *See* Serge Schmemann, *For Emigres From Eastern Europe, Journey Ends Just Short of West*, N.Y. TIMES, Nov. 1, 1990, at A13.

In January 1991, the French Government announced that it would no longer grant political refugee status to citizens from Czechoslovakia, Hungary, and Poland on the ground that those countries were now democracies. *See* Alan Riding, *France Imposes a Tighter Political Refugee Policy*, N.Y. TIMES, Feb. 14, 1991, at A11.

46. 27 WEEKLY COMP. PRES. DOC. 1757 (Dec. 9, 1991).

47. *See Smugglers of Human Contraband Across the Czech Border*, THE GERMAN TRIBUNE, No. 1488, Oct. 13, 1991, at 15.

ratify the Optional Protocol[48] to the International Covenant on Civil and Political Rights, relating to the status of refugees. The revolution across Central and Eastern Europe during the previous year brought political and socio-economic changes in Hungary. President Bush announced at Karl Marx University on July 12, 1989[49] that once the Hungarian Parliament passed a new emigration law,[50] he would inform Congress that Hungary was in full compliance with the Jackson-Vanik Amendment of the 1974 Trade Act. This would negate the need for an annual vote by Congress on Hungary's most-favored-nation trading status.

At the end of June 1989, Hungary dismantled its barbed-wire fence with Austria that had formed part of the "iron curtain" dividing Europe. On September 11, the Hungarian Government decided to allow East Germans to cross over its frontier to Austria, and thousands used this route to escape to West Germany until the G.D.R. cut off exit permits for travel to Hungary.

During October 1989, the Hungarian Parliament rewrote the constitution, legalized opposition political parties, and proclaimed itself a Republic instead of a "socialist republic".[51] Hungary had passed the litmus test and was granted temporary most-favored-trading status by the United States.[52] Although Hungarians were free to travel abroad, the amount of convertible currency for travel was curtailed by the Government in early November.[53]

The summer of 1990 witnessed a great upsurge of both Eastern and Western European tourists into Hungary, but authorities were most concerned with the 850,000 Romanian tourists who were still in the country.[54] Hungary also became the destination for thousands of Romanian ethnic Hungarians and other Romanian nationals. Other East Europeans used Hungary as the conduit to Western European countries with the result that in September 1990, Austria assigned army troops to patrol its border with Hungary and returned illegal immigrants.[55]

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48. DEPT. OF STATE BULL, Aug. 1989, at 89.

49. Henry Kamm, *Bush Extends Support to Hungary And Offers Modest Ecomomic Aid*, N.Y. TIMES, July 13, 1989, at A1; excerpts from the President's speech are found at A10.

50. The necessary legislation was passed during October 1989. For a discussion of the legislation see Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TULANE L. REV. 849, 855-861 (1991).

51. *See* N.Y. TIMES, Oct. 19, 1989, at A8; Oct. 20, 1989, at A10; and Oct. 24, 1989, at A1.

52. *See* Emigration Laws and Policies of the Republic of Hungary, Message from the President of the United States transmitting his determination that Hungary meets the emigration criteria for the Jackson-Vanik Amendment to the Trade Act of 1974, *pursuant to* 19 U.S.C. 2432 (b), 102d Cong. 1st Sess. House Doc. 102-33, Jan. 23, 1991.

53. *See* Henry Kamm, *Most Hungarians Enjoy Freedom From Politics*, N.Y. TIMES, Nov. 7, 1989, at A14.

54. *See* Celestine Bohlen, *Flow of Tourists Shifts in Hungary*, N.Y. TIMES, Sept. 6, 1990, at A5.

55. *See* Serge Schmemann, *For Emigres From Eastern Europe, Journey Ends Just Short of West*, N.Y. TIMES, Nov. 1, 1990, at A13. Austria, however, did not reimpose visa

The Hungarian Government continued its liberal emigration policy and was rewarded on December 4, 1991 with permanent most-favored-nation trading status by the United States.[56] Meanwhile, the civil war in neighboring Yugoslavia brought refugees seeking temporary shelter into the surrounding States, periodically causing the host to resort to extreme measures. For example, during October 1991, Hungarian border authorities required visitors at Soviet and Romanian borders to prove that they had sufficient funds to return home before allowing admittance.[57] Since September 1989, Hungary has supported the emigration of Soviet Jews to Israel by allowing Budapest to be a transit stop for flights to Tel Aviv from Moscow, despite occasional acts of terrorism on Hungarian territory.[58]

E. *Poland*

In Poland, a Solidarity-led government took office on September 12, 1989. On November 21, the United States, recognizing that both Hungary and Poland had made remarkable progress toward becoming free and democratic societies, announced that it would sharply curtail admission of their citizens to the United States as political refugees unless there was well-founded fear of persecution in their home country.[59]

The opening of the East German border with West Germany on November 9, 1989 strained East German-Polish relations. Their common border had remained closed since 1981 when Poland imposed martial law. As a result, only those Poles with a formal invitation to East Germany or who were en route to West Berlin could enter the G.D.R. With the need for workers in East Germany, about 40,000 Poles were leaving with or without proper passports to work in the G.D.R.[60]

Once borders were opened between East and West Germany, Poles began to cross the border in record numbers to shop and to smuggle. The actual numbers became so great that the West Berlin Senate announced

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requirements for Hungarians or Czechoslovakians as it did upon Poles on Sept. 7. *See* Craig R. Whitney, *Surprise for Western Europe: Eastern Kin Come Knocking*, N.Y. TIMES, Nov. 15, 1990, at A1. *See also* Alan Riding, *West Europe Braces for Migrant Wave From East*, N.Y. TIMES, Dec. 14, 1990, at A10.

56. 27 WEEKLY COMP. PRES. DOC. 1757 (Dec. 9, 1991).

57. *See* Celestine Bohlen, *Neighbors Making Budapest Uneasy*, N.Y. TIMES, Oct. 13, 1991, at A8; Celestine Bohlen, *Hungarians Open Hearts and Homes to Yugoslavs*, N.Y. TIMES, Oct. 18, 1991, at A1.

58. *See Hungary Bombing Leaves 6 Wounded*, N.Y. TIMES, Dec. 24, 1991, at A9.

59. This change would bar refugee status to at least 19,000 of the 20,000 Poles and Hungarians who had filed applications at American embassies and consulates. Only 6,500 refugees were to be admitted into the U.S. in fiscal year 1990. In the previous year, 3,607 Polish and 1,075 Hungarian refugees were admitted. *See* Robert Pear, *Number of Poles and Hungarians Admitted as Refugees Will Be Cut*, N.Y. TIMES, Nov. 22, 1989, at A1.

60. *See* Craig R. Whitney, *New Measures Strain Poland's Ties to 2 Germanys*, N.Y. TIMES, Dec. 16, 1989, at A8; John Tagliabue, *Poles Seeking The Jobs Left By Germans*, N.Y. TIMES, Nov. 18, 1989, at A7.

in early June 1990 that as of July 1st all Poles entering the city would require a valid West German visa.[61] After German reunification in October 1990, Poland continued to admit former East Germans as visitors without a visa, while the German Government continued to require visas for entry by Poles.[62]

Due to the great numbers of Romanians coming into Poland and seeking to stay and trade illegally, Poland counteracted on December 10, 1990 by requiring Romanians to show 200,000 zlotys for each day they wished to stay.[63] On March 29, 1991, the Benelux countries, France, Germany, and Italy agreed to allow Polish nationals to travel visa-free.[64]

By early October 1991, more than four million Soviet citizens had visited Poland. After May 20, 1991, when Soviet citizens could emigrate legally, many went to Poland on a valid passport and an invitation from a Polish citizen to legally work in the country where they earned convertible Polish currency. Officially, Poland could not estimate the total number of these Soviet guest workers.[65]

F. *Romania*

On June 26, 1989, Romania began to remove the 188-mile barbed-wire fence that it had erected to prevent its Hungarian minority from crossing illegally into Hungary.[66] Events in Central and Eastern Europe during 1989 did not bring any relaxation of freedom-of-movement restrictions from the Romanian Government. However, tens of thousands of Romanians fled illegally to Hungary over the previous two years, including the former Olympic champion, Nadia Comaneci, in late November.[67] Before the year's end, protests against the Government's repression led to violence, death, and the ouster from power of President Ceausescu.[68] The

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61. *See* Michael Kallenbach, *West Berlin Limits Invasion of Polish Shoppers*, CHRISTIAN SCIENCE MONITOR, June 5, 1990, at 4.

62. Austria reimposed its visa requirement for Poles on Sept. 7, 1990. *See* Craig R. Whitney, *Surprise for Western Europe: Eastern Kin Come Knocking*, N.Y. TIMES, Nov. 15, 1990, at A1.

63. *See For East Europe's Hopeful, Warsaw Glitters*, N.Y. TIMES, Dec. 26, 1990, at A7.

64. Under the agreement, Poland agreed to take back its citizens who overstayed the 3-month travel period or who worked illegally in any of the six countries. *See* John Tagliabue, *Poles Get Wider Travel Rights*, N.Y. TIMES, Mar. 30, 1991, at A2; Stephen Kinzer, *Germany Lets Poles in Without Visas*, N.Y. TIMES, April 9, 1991, at A3.

65. *See* Stephen Engelberg, *Lured by Zlotys, Ivan Plays The Model Migrant Worker*, N.Y. TIMES, Oct. 6, 1991, at A1.

66. *Rumania Is Said to Remove Fence Along Hungary Border*, N.Y. TIMES, June 27, 1989, at A4. The Romanian response may have been due to the Soviet Union's first public criticism of an Eastern European ally during the first CSCE sponsored meeting at the Conference on the Human Dimension in Paris. *See* Steven Greenhouse, *Soviets, at Parley on Rights, Assail Rumania Over Fence*, N.Y. TIMES, June 25, 1989, at 17.

67. N.Y. TIMES, Nov. 30, 1989, at A19.

68. *See* David Binder, *At Least 13 Are Reported Killed at Protest in Rumania's Capital*, N.Y. TIMES, Dec. 22, 1989, at A1. Romania's 11 days of turmoil are shown on a day-by-day basis in Reports in Romania, N.Y. TIMES, Dec. 27, 1989, at A11.

new government adopted a more liberal emigration policy such that West Germany had to plan for the immigration of an estimated 220,000 ethnic Germans from Romania.[69] Meanwhile, Romanians who applied for emigration to the United States were told that they were no longer eligible for preferential treatment as immigrants since political repression was no longer a factor.[70]

After the fall of the Ceausescu regime, the West became aware of the plight of thousands of Romanian children who were abandoned and orphaned. Nearly 7,000 of these children have been adopted since December 1989 by Western European and American couples. Unfortunately, an illegal market involving children for sale was created alongside the genuine humanitarian desire to adopt through the legal international adoption process. By May 23, 1991, Americans had adopted 1,443 Romanian children, oftentimes in the face of great obstacles in obtaining the requisite United States visa for the child. The Romanian Government announced that as of June 1, 1991 foreign adoptions would be suspended until new legislation was in place to curtail illegal trafficking of children.[71]

Generally, foreign travel and emigration are no longer restricted for Romanians. During 1990, the Government issued more than 3.6 million tourist passports and more than 129,000 emigrant passports. In the case of the latter, the applicant must prove to be debt-free, comply with regulations concerning termination of employment, and present a customs

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Soon after Ceausescu's death, it was disclosed that Israel secretly paid thousands of dollars for each visa issued to allow Romanian Jews to emigrate to Israel. Ceausescu personally pocketed more than $50 million from this practice. *See* Clyde Haberman, *For Judaism's Remnant, Coup Is Mixed Blessing*, N.Y. TIMES, Jan. 3, 1990, at A12. The appearance of Romania's liberal emigration policy towards its Jewish population brought the added benefit of most-favored-nation status in trade with the United States for many years until President Reagan withdrew the status in February 1988.

From 1978 until the death of Ceausescu, the Bonn Government paid a bounty of approximately $5,000 (U.S.) for each of the 10,000-15,000 ethnic Germans allowed to emigrate annually from Romania. *See* Chuck Sudetic, *Ethnic Germans in Romania Dwindle*, N.Y. TIMES, Dec. 28, 1990, at A3.

69. WEEK IN GERMANY, Jan. 19, 1990, at 1. Some 23,000 ethnic Germans left Romania in 1989. GERMAN TRIBUNE, No. 1417, April 29, 1990, at 6.

70. *See* David Binder, *Rumanians Fret, "Where Are The Americans?"* N.Y. TIMES, Jan. 23, 1990, at A9. The ousted Communist leaders in many of the Eastern European countries and the process of democratization caused new flows of economic refugees. On March 15, 1990, Austria, which had 21,882 East Europeans including approximately 8,000 Romanians in 1989, and 3,500 so far in 1990, changed its admissions procedure requiring visas before reaching the border and visitors to have the equivalent of $400 in Western currency to pay for their stay. To avoid the new requirements some 5,000-7,000 Romanians entered Austria to claim refugee status during the last 24 hours before the deadline. *See* Paul Lewis, *Romanians Flood Austria as It Restricts Borders*, N.Y. TIMES, Mar. 15, 1990, at A12.

71. *See* David Binder, *U.S. Issues Warning of Obstacles in Adopting Romanian Children*, N.Y. TIMES, May 24, 1991, at A2; *Romania Halts Adoptions, Pending Law*, GLOBE AND MAIL, May 24, 1991, at A8. On July 27, 1991, the United States Immigration and Naturalization Service announced measures to restrict the adoption of Romanian children. *See U.S. Moves to Curb Adoption of Romanians*, N.Y. TIMES, July 28, 1991, at 8.

declaration for goods taken out of the country.[72] As Romanian emigration policy reflected a wide freedom of choice, President Bush waived the Jackson-Vanik Amendment on August 17, 1991[73] making Romania eligible to apply for credit guarantees for commercial imports of U.S. agricultural products. The waiver did not restore most-favored-nation tariff status, which Romania renounced in 1988.

G. *Soviet Union*

On March 8, 1989, the Soviet Union announced that it would accept the jurisdiction of the International Court of Justice with respect to five human rights treaties.[74] At the end of March, the Soviet psychiatric society was granted provisional readmission to the World Psychiatric Association despite a preliminary report by a group of visiting experts that the official Soviet practice of confining political prisoners in mental hospitals had not ended.[75]

The Soviet policy of glasnost impacted travel in a positive way. By mid-summer, Western diplomats had seen a draft of a Soviet law that would allow Soviet citizens to leave the country at the invitation of foreign business, organization, or individual. There was to be an easing of the "state secrets" impediment and removal of the 500 ruble exit tax on emigres to Israel. Moreover, the requirement of an invitation from abroad for private visits was to be erased. Private travel had already increased dramatically in the first six months of 1989.[76]

Before September 1988, Soviet Jews and evangelical Christians were almost always accorded refugee status by the United States for immigra-

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72. President's 29th CSCE Report, Implementation of the Helsinki Final Act, Apr. 1, 1990-Mar. 31, 1991, U.S. Dept of State, 2 DISPATCH Supplement No. 3, at 32-33 (July 1991).

73. Exec. Order 12,772, *reprinted in* 27 WEEKLY COMP. PRES. DOC. 1167 (August 26, 1991).

74. *See* Paul Lewis, *Soviets To Accept World Court Role In Human Rights*, N.Y. TIMES, Mar. 9, 1989, at A1.

75. See Elaine Sciolino, *Panel of World Psychiatrists Votes To Readmit Soviets to Membership*, N.Y. TIMES, Mar. 31, 1989, at A2; Bill Keller, *U.S. Psychiatrists Fault Soviet Units*, N.Y. TIMES, Mar. 12, 1989, at A1. For a synopsis of the American findings in its report, *see US and USSR Psychiatric Care Practices*, Hearing before the Subcommittee on Health and the Environment, Comm. Energy & Commerce, H.R. 101st Cong. 1st Sess. Oct. 2, 1989; Robert Pear, *Report Reproaches Soviet Psychiatry*, N.Y. TIMES, July 13, 1989, at A3. *See also* Robert Pear, *U.S. Psychiatrists Oppose Soviet Members For World Group*, N.Y. TIMES, Sept. 21, 1989, at A15; Michael R. Gordon, *Soviet Envoy Tells U.S. of Psychiatric Reforms*, N.Y. TIMES, Oct. 3, 1989, at A10. The Soviet Union was readmitted on October 18, 1989. Steny H. Hoyer, *Psychiatric Abuses Persist in Russia*, THE WASH. POST; Aug. 22, 1989, at A19. *See generally*, Lorri M. Thompson, *Soviet Straightjacket Psychiatry: New Legislation to End the Psychiatric Reign of Terror in the U.S.S.R.*, 16 SYRACUSE J. INT'L L. & COM. 271 (1990); Richard J. Bonnie, *Coercive Psychiatry and Human Rights: An Assessment of Recent Changes in the Soviet Union*, 1 CRIM. L. F. 319 (1990).

76. Ann Cooper, *U.S. Foresees Rush In Soviet Emigres*, N.Y. TIMES, July 13, 1989, at A1. On July 26, tourist visas for Israeli visits to the Soviet Union became available for the first time since 1967. N.Y. TIMES, July 27, 1989, at 6.

tion purposes. Most of the Jews who initially left the Soviet Union had visas for Israel, but once in Rome or Vienna, they often opted to emigrate to the United States instead.[77] After the relaxation of Soviet exit restrictions, Congress passed bills to make it easier for Soviet Jews and evangelical Christians to emigrate to the United States. However, as the Soviet door opened wide, the Bush administration announced a new policy to go into effect on October 1 to choke the flow of these refugees to the United States.[78] The new law imposed a ceiling of 50,000 Soviet refugees for 1990 fiscal year.[79]

Noting the political changes and the more liberal government policies regarding freedom of movement among many of the East bloc countries during the previous three months, and due to its desire for the United States to remove trade barriers, on November 16 the Soviet Union promised to revise its law and permit freer emigration for Soviet citizens.[80] As a result, Soviet Jews were allowed to emigrate during 1989 in record numbers. To assist emigrants leaving for Israel, El Al and Aeroflot national airlines signed an agreement for direct flights between Moscow and Tel

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77. Israel was clearly not able to absorb all of the Soviet Jews who emigrated to the country. *See* Joel Brinkley, *Soviet Jews Finding Israel Short of Jobs and Housing*, N.Y. TIMES, Sept. 17, 1989, at A1. Roberta Cohen, *Israel's Problematic Absorption of Soviet Jews*, 3 INT'L J. REFUGEE L. 60 (1991).

Israel asked the U.S. for loan guarantees to finance construction of housing for the Soviet emigres. *See* Robert Pear, *Israel Asking U.S. For Aid On Housing For Soviet Emigres*, N.Y. TIMES, Oct. 2, 1989, at A22.

78. *See* Robert Pear, *U.S. Drafts Plans To Curb Admission of Soviet Jews*, N.Y. TIMES, Sept. 3, 1989, at A1; Robert Pear, *Soviet-Refugee Plan Faulted: Critics Say Flow Will Dry Up*, N.Y. TIMES, Sept. 15, 1989, at A1. *See also* Greg A. Beyer, *The Evolving United States Response to Soviet Jewish Emigration*, 3 INT'L J. REFUGEE L. 30 (1991).

In 1989, nearly 9,000 evangelical Christians traveled to the United States via Austria and Italy. The new procedure led to great hardships for those emigrating so that the U.S. had to arrange a special airlift for about 6,000 Soviet Christians in Sept. 1990. *See* Philip Shenon, *U.S. Begins Airlift of Soviet Christians*, N.Y. TIMES, Sept. 22, 1990, at A3.

79. *See* Lucia Mouat, *US Open-Door Policy Shuts Slightly*, THE CHRISTIAN SCIENCE MONITOR, Sept. 29, 1989, at 7; Robert Pear, *Closing The Door Halfway For Emigrant Soviet Jews*, N.Y. TIMES, Sept. 24, 1989, at E3. The U.S. would only be admitting 6,500 refugees from Eastern Europe during the 1990 fiscal year. *See* Robert Pear, *Bush Seeks Slight Increase In Flow of Refugees to U.S.*, N.Y. TIMES, Sept. 12, 1989, at A12.

Although the U.S. issued about 100,000 visas to Soviet business and professional visitors in 1989, and more than 1,000 visas to Soviet scientists to teach and conduct research at American institutions, red tape in the U. S. bureaucracy could not keep up with the demand. *See* Malcolm W. Browne, *Visas For Scientists From East Said to Lag Despite Eased Tensions*, N.Y. TIMES, Feb. 11, 1990, at A22.

80. *See* Robert Pear, *Soviets to Liberalize Emigration, Hoping to Gain U.S. Trade Deal*, N.Y. TIMES, Nov. 17, 1989, at A1. The Soviet Union was successful in reaching a trade agreement with the European Community on November 27, but the agreement did not confer most-favored-nation status upon the Soviet Union, a status that the Soviet Union was seeking from the United States, but it would be required to implement the proposed emigration law. *See* Paul L. Montgomery, *Trade Pact For Soviets And Europe*, N.Y. TIMES, Nov. 28, 1989, at D1; Amy Kaslow & Paul L. Bush, *Congress Work To Give Favored Trade Status to Soviets*, CHRISTIAN SCIENCE MONITOR, Nov. 16, 1989, at 1.

Aviv to begin in 1990.[81] In 1989, the Soviet Union allowed more than 70,000 Soviet Jews to emigrate.[82]

Another example of greater tolerance by the Soviets for travel by its citizenry occurred in March 1990 when the Soviet Union concluded an agreement with Iran allowing Soviet Azerbaijanis to travel to Iran for the first time since becoming a communist state.[83] Along with the new nationalism emerging in the Soviet republics, such as the demand for independence from the Baltic States and other parts of Eastern Europe, old hatreds also emerged.[84]

As the agreement for direct flights from Soviet cities to Israel did not enter into operation, the route remained Soviet Union-Hungary-Tel Aviv. In March, the Soviet Union announced that this route could no longer used because Hungary was threatened with terrorism from an Islamic fundamentalist group. Hungary suspended flights to Israel for Soviet emigrants.[85] A few days later, Poland responded that it would transport the Soviet Jews to Israel.[86]

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81. *See* Joel Brinkley, *Soviet Jews Leave At A Record Pace, Many For Israel*, N.Y. TIMES, Dec. 14, 1989, at A1. The number of Soviet Jews arriving in Israel for resettlement alarmed the Arab World that they would displace Palestinians in the occupied territories. *See* Alan Cowell, *Arabs Warning Against Influx of Soviet Jews*, N.Y. TIMES, Jan. 29, 1990, at A12. For the Israeli response, *see* Sabra Chartrand, *Jerusalem Says It Has No Policy To Settle Soviet Jews in West Bank*, N.Y. TIMES, Jan. 31, 1990, at A2. On February 4, 1990, on a visit to Tunis, the Deputy Soviet Foreign Minister indicated that Moscow would not allow direct flights from Moscow to Tel Aviv. *See* Joel Brinkley, *How Shamir At Home Caused Storm Abroad*, N.Y. TIMES, Feb. 5, 1990, at A12. During 1989, 12,923 Soviet Jews arrived in Israel. Bruce W. Nelan, *Exodus to the Promised Land*, TIME, Feb. 12, 1990, at 42.

Interestingly, Israel reported that 12,923 Soviet Jews emigrated to the country while approximately 15,000 Israelis left permanently. *See* Joel Brinkley, *As Jerusalem Labors to Settle Soviet Jews, Native Israelis Slip Quietly Away*, N.Y. TIMES, Feb. 11, 1990, at A3.

82. According to Israel, 71,196 Soviet Jews emigrated in 1989. *See* Robert Pear, *Moscow Rejects U.S. Plea to Allow Flights to Israel*, N.Y. TIMES, Feb. 20, 1990, at A1.

83. *Iran Allowing Travel By Soviet Azerbaijanis*, N.Y. TIMES, Mar. 22, 1990, at A16.

84. *See* William Korey, *A Fear of Pogroms Haunts Soviet Jews*, N.Y. TIMES, Jan. 25, 1990, at A23. Francis X. Clines, *Anxiety Over Anti-Semitism Spurs Soviet Warning on Hate*, N.Y. TIMES, Feb. 2, 1990, at A1; Frank J. Prial, *Survey in Moscow Sees a High Level of Anti-Jewish Feeling*, N.Y. TIMES, Mar. 30, 1990, at A8.

Nor was the hatred confined to the Soviet Union. *See* Celestine Bohlen, *A Survival of the Past, Anti-Semitism Is Back*, N.Y. TIMES, Feb. 20, 1990, at A10; Celestine Bohlen, *The Romanian Revolution Over, It's Back to Old Hatreds in Transylvania*, N.Y. TIMES, Mar. 21, 1990, at A16. Marvine Howe, *Eastern Europe Jews Bring Mixed Reports of the New Societies*, N.Y. TIMES, Mar. 18, 1990, at A15.

85. *See* Celestine Bohlen, *Hungary Halts Emigre Flights After Muslim Threat*, N.Y. TIMES, Mar. 22, 1990, at A18; Joel Brinkley, *Soviets to Curb Jews' Flights to Israel*, N.Y. TIMES, Mar. 24, 1990, at A6. One later report indicated that not all Hungarian charter flights to Israel were discontinued. *See* Joel Brinkley, *Soviet Emigres to Israel Topped 7,000 in March*, N.Y. TIMES, Apr. 3, 1990, at A5.

86. *See* Frank J. Prial, *Poland Promises to Help Soviet Jews Fly to Israel*, N.Y. TIMES, Mar. 27, 1990, at A11; Stephen Engelberg, *Poland to Let Soviet Jews Fly to Israel From Warsaw*, N.Y. TIMES, May 30, 1990, at A14. Other countries also were willing to issue transit visas to Israel bound Soviet Jews. *See* Celestine Bohlen, *Victor in Hungary Sees '45 as the Best of Times*, N.Y. TIMES, Apr. 10, 1990, at A8 and Youssef M. Ibrahim, *Israel Answers*

On June 1, 1990, after receiving assurances from President Gorbachev on the proposed emigration law and efforts to resolve the crisis over Lithuania's independence, President Bush and the Soviet leader signed a trade agreement.[87] Because of the greater numbers of Soviet Jews emigrating to Israel and Arab concern[88] over these new immigrants displacing the Arabs in the Israeli occupied territories, President Gorbachev warned Israel that emigration would be curtailed if Israel did not pledge to keep Soviet Jews from settling on these lands.[89] In a surprise move at the end of September, President Gorbachev announced his approval for direct flights to resume between the Soviet Union and Israel. Hence, Soviet emigrants would no longer need to arrive via European transit points.[90] Meanwhile, by mid-September 1990, the sharp increase in applications by Soviet Jews waiting to emigrate to the Federal Republic of Germany brought that country's Interior Ministry to request its consulates in the USSR to stop processing further applications.[91] During October, the United States announced that it would admit 60,000 Soviet

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Soviets, Denies Plans for Settlers, N.Y. TIMES, June 4, 1990, at A11.

87. *See* Clyde H. Farnsworth, *Trade Accord Holds Many Prizes, But Obstacles to Passage Remain*, N.Y. TIMES, June 2, 1990, at A7. On June 5, the Soviet Parliament indicated that it would not take up the emigration bill until September. *See* Andrew Rosenthal, *Bush Gains Time as Moscow Delays Law on Emigration*, N.Y. TIMES, June 6, 1990, at A1. *See also* Steckelman, *Advancing Soviet-American Trade: The Legal Steps Necessary to Further Economic Relations*, 11 N.Y. L. SCH. J. INT'L & COMP. L. 463 (1990).

88. *See* Alan Cowell, *Arabs Applaud Gorbachev Remark*, N.Y. TIMES, June 5, 1990, at A3.

89. *See* Joel Brinkley, *Israel Won't Send Soviet Immigrants to The West Bank*, N.Y. TIMES, June 25, 1990, at A1; Joel Greenberg, *Israel Bows to Soviet Pressure On Settling Jewish Emigrants*, CHRISTIAN SCIENCE MONITOR, June 27, 1990, at 6.

Israel was not able to cope with growing numbers of immigrants. *See* Joel Brinkley, *In Emigre Crush, Tent Towns Sprout for Israelis*, N.Y. TIMES, June 22, 1990, at A10; Joel Brinkley, *On Settling Soviet Jews Israel Not So Clear Now*, N.Y. TIMES, June 27, 1990, at A8; Joel Greenberg, *Poor Israelis Protest Influx of Soviet Jews*, THE CHRISTIAN SCIENCE MONITOR, July 18, 1990, at 5; Sabra Chartrand, *Taxes Approved by Israeli Cabinet*, N.Y. TIMES, Sept. 14, 1990, at A6. Jews were also emigrating to Israel from other countries. *See* Clifford Krauss, *Ethiopia Says all Jews Are Free to Leave for Israel*, N.Y. TIMES, Nov. 2, 1990, at A11.

Perhaps to stem the tide of Soviet emigres to Israel the question was raised as to who qualified as a "Jew" for immigration purposes. *See* Abraham Rabinovich, *Screening Soviet Immigrants*, CHRISTIAN SCIENCE MONITOR, Aug. 29, 1990, at 18.

The growing number of Soviet emigres to Israel became acute with respect to Israeli-U.S. relations. *See Israel Retracts Pledge to U.S. On East Jerusalem Housing*, N.Y. TIMES, Oct. 19, 1990, at A16. *See also* Sabra Chartrand, *Israel Lags in Housing for Soviet Jews*, N.Y. TIMES, Nov. 2, 1990, at A11.

90. *Israel Says U.S.S.R. Approves Direct Flights*, N.Y. TIMES, Sept. 30, 1990, at A8.

91. WEEK IN GERMANY, Oct. 12, 1990, at 6. On Oct. 31, the Bundestag in Bonn called for freedom to emigrate to Germany for Soviet Jews, WEEK IN GERMANY Nov. 2, 1990, at 2. *See also* Stephan Kinzer, *New Aspiration For Soviet Jews Life in Germany*, N.Y. TIMES, Dec. 25, 1990 at A1. During 1990, over 5,000 Soviet Jews who came to Germany as visitors were granted residency status. Thousands more completed the necessary visa application for emigration in 1991. *See* Francine Kiefer, *Soviet Jews Emigrate to Germany*, CHRISTIAN SCIENCE MONITOR, July 29, 1991, at 6.

refugees for the 1991 fiscal year.[92] The U.S. change in procedure that allowed Soviet emigrants to leave for the United States directly from Soviet territory did not function smoothly. For example, under the previous system, Soviet Christian fundamentalists were required to have entry permits from Israel in their passports although the United States was the actual destination. Soviet bureaucratic recalcitrance in October 1990 refused to allow these U.S.-bound emigres to depart.[93]

Soviet emigres were arriving in Israel in such record numbers that the Israeli Government was pressed to take unpopular domestic measures to absorb the newcomers.[94] Soviet emigration figures for the year were so high and the anticipated food shortages in the Soviet Union for the winter so realistic that a change of United States policy on December 12, 1990 was announced by President Bush temporarily waiving parts of the Jackson-Vanik Amendment and providing the Soviet Union with $1 billion in loan guarantees to purchase needed food.[95]

In January 1991, at an international conference[96] sponsored by the Council of Europe on migrants and refugees, the Soviet Union indicated that Western European nations could expect as many as 2 million Soviet

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92. *See* Andrew Rosenthal, *U.S. Will Allow 6,000 More Refugees Next Year*, N.Y. TIMES, Oct. 16, 1990, at A11. During 1990, some 50,000 Soviet refugees came to the United States, 40,000 of whom came with U.S. federal assistance, and 10,000 with assistance from private organizations.

93. *See* Francis X. Clines, *200 on Verge of Soviet Exit Are Stalled*, N.Y. TIMES, Oct. 25, 1990, at A3.

94. *See* Joel Brinkley, *Israeli Cabinet Approves Increase in Taxes to Help Immigrants*, N.Y. TIMES, Nov. 29, 1990, at A8; Joel Brinkley, *Israelis Go On Strike to Fight a Tax to Absorb Emigres*, N.Y. TIMES, Dec. 3, 1990, at A3. *See also* Youssef M. Ibrahim, *Soviet Influx Has the Israelis Building, Fighting and in Awe*, N.Y. TIMES, Jan. 9, 1991, at A1.

In February 1991, what was to become a major irritant in U.S. loan guarantees for housing Soviet Jews began. *See* Joel Brinkley, *U.S.-Israeli Strains Appear Over Delayed Housing Aid*, N.Y. TIMES, Feb. 8, 1991, at A10; Joel Brinkley, *Israel Asserts New U.S. Aid For Housing Is Insufficient*, N.Y. TIMES, Feb. 22, 1991, at A2.

On the problems faced by the Soviet newcomers to Israel, see Joel Brinkley, *For New Soviet Immigrants in Israel, Hard Times*, N.Y. TIMES, Mar. 9, 1991, at A1.

95. *See* Andrew Rosenthal, *Bush, Lifting 15-Year-Old Ban, Approves Loans For Kremlin to Help Ease Food Shortages*, N.Y. TIMES, Dec. 13, 1990, at A1; Clyde H. Farnsworth, *Bush's Move Unlikely to Mean Quick Trade Surge*, N.Y. TIMES, Dec. 13, 1990, at A22; Clyde H. Farnsworth, *U.S. and Partners in Accord on Aid to Soviet Economy*, N.Y. TIMES, Dec. 14, 1990, at A1.

By the end of 1990, more than 370,000 emigrants left the Soviet Union including 195,500 Jews and 148,000 ethnic Germans. 12 CRS REVIEW 33 (July 1991).

For differing views on the merits of the waiver of the Jackson-Vanik Amendment, *see* Bradner, *The Jackson-Vanik Amendment To The Trade Act of 1974: Soviet Progress on Emigration Reform Is Insufficient to Merit A Waiver*, 4 GEO. IMMIGR. L. J. 639 (1990); Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law?*, 8 B.U. INT'L L. J. 363 (1990); Dow, *Linking Trade Policy to Free Emigration: The Jackson-Vanik Amendment*, 4 HARV. HUM. RTS. J. 128 (1991).

96. *See* Celestine Bohlen, *Europeans Confer on Emigre Limits*, N.Y. TIMES, Jan. 27, 1991, at A1; Paul Lewis, *As Soviet Borders Open, the West Braces for an Economic Exodus*, N.Y. TIMES, Feb. 10, 1991, at D4.

citizens to leave their country in search of work once the USSR passed its new travel law. During early May, the Supreme Soviet began to debate the long-awaited emigration bill.[97] Finally, on May 20th, the law was passed conferring the right of Soviet citizens to travel and emigrate freely beginning on January 1, 1993.[98] This move was regarded with favor by President Bush who on June 3 exercised his discretion to waive the requirements of the Jackson-Vanik Amendment for twelve more months and thereby allowing further credit guarantees to the Soviet Union for additional food purchases.[99] In May, Israeli authorities acknowledged that many Soviet Jews had decided to postpone emigration to Israel because of conditions in Israel rather than any obstacles preventing their departure.[100]

During the Moscow summit in July, President Bush announced that the June 1990 Agreement on Trade Relations between the United States and the Soviet Union would be submitted for Congressional approval.[101] The Agreement entered into force on October 9, 1991.[102]

In early September, the Soviet Union recognized the independence of

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97. *See A Free-Emigration Bill Is Debated in Moscow*, N.Y. TIMES, May 8, 1991, at A10; Esther B. Fein, *Wary of Expense Soviets Debate Bill on Travel and Emigration*, N.Y. TIMES, May 13, 1991, at A6; Esther B. Fein, *Soviets Stalling A Bill To Permit Free Emigration*, N.Y. TIMES, May 14, 1991, at A1.

98. For a brief account of how the emigration law was passed, *see Parliament Finally Passes Emigration Law*, 43 CURRENT DIGEST OF THE SOVIET PRESS 10 (June 19, 1991); On Procedures For Exit From The Union of Soviet Socialist Republics and Entry Into The Union of Soviet Socialist Republics by USSR Citizens, *translated in* 43 CURRENT DIGEST OF THE SOVIET PRESS 14 (July 31, 1991). *See also* Esther B. Fein, *Soviets Enact Law Freeing Migration And Trips Abroad*, N.Y. TIMES, May 21, 1991, at A1. *See also* Vladimir Kartashkin, *Human Rights And The Emergence Of The State Of The Rule Of Law In The USSR*, 40 EMORY L.J. 889, 900-902 (1991).

Apparently the new passport law's procedure went into effect on July 1, 1991, as over 20,000 Soviet Jews emigrated to Israel in June in a rush to leave the country as they doubted the Soviet bureaucracy's ability to implement the new procedure. *See* Joel Brinkley, *Rush of Soviet Immigrants to Israel*, N.Y. TIMES, July 2, 1991, at A3.

Several British and American politicians pointed out certain restrictive provisions in the new Soviet emigration law. *See* British Information Service, 21 SURVEY OF CURRENT AFFAIRS 360-361 (Oct. 1991); Commission on Security and Cooperation In Europe, DIGEST 3 (May 1991).

99. *See* Thomas L. Friedman, *Bush Clears Soviet Trade Benefits and Weighs Role in London Talks*, N.Y. TIMES, June 4, 1991, at A1. In 1990, the Soviet Union allowed more than 370,000 citizens to emigrate. *See* CRS REVIEW, July 1991, at 33. *See also* Andrew Rosenthal, *Bush Backs Loans For Soviet Farms Worth $1.5 Billion*, N.Y. TIMES, June 12, 1991, at A1. The waiver to the Soviet Union also applied to Estonia, Latvia and Lithuania. *See* President's Letter to Congressional Leaders on Trade With the Soviet Union, Bulgaria, Czechoslovakia and Mongolia, 27 WEEKLY COMP. PRES. DOC. 706 (June 10, 1991).

100. *See* Serge Schmemann, *Jews In Moscow Expect Flow of Emigrants to Israel to Pick Up Again*, N.Y. TIMES, May 5, 1991, at A1; Joel Brinkley, *Israeli Economy Is Keeping Many Jews in U.S.S.R.*, May 5, 1991, at A1; Sabra Chartrand, *In Promised Land, Jobs Don't Match The Dream*, N.Y. TIMES, June 21, 1991, at A4.

101. *See* Keith Bradsher, *Soviet Trade Pact Sent To Congress*, N.Y. TIMES, Sept. 12, 1991, at A13.

102. 27 WEEKLY COMP. PRES. DOC. 1422 (Oct. 14, 1991).

the Baltic States. The following week, at the first session of the Moscow meeting of the Conference on the Human Dimension of the CSCE, Estonia, Latvia and Lithuania were admitted to membership.[103] On December 4, 1991, the three Baltic States received permanent most-favored-nation trading status from the United States.[104]

Although Soviet emigration was liberalized during 1991, only 39,000 Soviet refugees came to the United States during the 1991 fiscal year.[105] During the second week of December, when Russia, Ukraine, and Byelorussia declared themselves the "Commonwealth of Independent States," Israel braced itself for another wave of immigration before the end of the year as 70,000 people already had full Soviet permission to leave and another 30,000 had Israeli entry visas in hand.[106]

IV. IMMIGRATION IN THE FUTURE

The fall of communism in Eastern Europe and the Soviet Union and the desire to bring about economic reforms have caused widespread unemployment, food shortages, and a race to find a better standard of living elsewhere. The States of destination of those seeking greener pastures cannot absorb the population movements. Germany took in 193,000 asylum seekers in 1990, almost half of the 420,000 in all of Western Europe, and was already host to 5.7 million legal aliens in its territory. Thousands of asylum-seekers, immigrants, and foreign workers have become the victims of verbal and physical attack in Germany.[107]

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103. *See* Craig R. Whitney, *Moscow Rights Conference Sees Danger in Nationalism*, N.Y. TIMES, Sept 11, 1991, at A10.

104. 27 WEEKLY COMP. PRES. DOC. 1757 (Dec. 9, 1991).

105. Fiscal 1991 provided for a maximum of 50,000 Soviet refugees who could settle in the United States. President Bush authorized the admission of 61,000 Soviet refugees for fiscal year 1992. *See Bush Opens the Door to 142,000 Refugees*, N.Y. TIMES, Oct. 11, 1991, at A8.

Aside from Soviet emigration, the end of the cold war saw an increase in the travel to the United States of thousands of tourists, students, writers, businessmen, and athletes, and after the disintegration of the Soviet Union of government representatives from the republics. *See* Seth Mydans, *Seeking Shelter in U.S. After the Soviet Storm*, N.Y. TIMES, Jan. 25, 1992, at A1.

106. Clyde Haberman, *Israel Braces for Influx from Slavic Regions*, N.Y. TIMES, Dec. 12, 1991, at A8; Clyde Haberman, *Israelis Prepare a Mass Airlift of Immigrants*, N.Y. TIMES, Dec. 30, 1991, at A7.

The beginning of 1992 saw a dwindling of emigration from the Soviet Union to Israel than for comparable periods in the two previous years for a variety of reasons. *See* Alan Cowell, *Influx From Ex — Soviet Lands Falling, Israel Says*, N.Y. TIMES, Jan. 31, 1992, at A11; Clyde Haberman, *Freer Jews Face Harder Choice: To Leave or to Stay*, N.Y. TIMES, Feb. 10, 1992, at A10; Joel Greenberg, *No Milk or Honey for Israel's Emigres*, N.Y. TIMES, Mar. 1, 1992, at A8.

107. *See* Stephan Kinzer, *A Wave of Attacks on Foreigners Stirs Shock in Germany*, N.Y. TIMES, Oct. 1, 1991, at A1; Stephan Kinzer, *German Visits Refugees Amid New Attacks*, N.Y. TIMES, Oct. 5, 1991, at A5; Stephan Kinzer, *German Vote Raises Foreigners' Fear*, N.Y. TIMES, Oct. 8, 1991, at A14; Stephan Kinzer, *Germans Seek to Protect Foreigners*, N.Y. TIMES, Oct. 10, 1991, at A12; *Politicians Condemn Attacks on Foreigners; Seek*

To check the surge in illegal East-West migration, Berlin hosted a conference of the ministers of interior at the end of October 1991 with twenty-seven European nations in attendance. Although the German host said "[w]e do want freedom of movement and travel in the future, but that cannot mean the right of residence for everyone,"[108] more obstacles will be created in the path of the movement of persons across international boundaries. Already, German politicians have called for common European immigration policies[109] and a European asylum regulation.[110]

Faster Asylum Process, WEEK IN GERMANY, Oct. 11, 1991, p.1. Bower, *Germany Divided Over Attacks On Refugees*, 5 GEO. IMMIGR. L.J. 815 (1991).

108. *See* John Tagliabue, *Germany Wins Europe's Backing for Tougher Controls on Migrants*, N.Y. TIMES, Nov. 1, 1991, at A6.

109. *See* Stephan Kinzer, *Britain Unswayed on United Europe*, N.Y. TIMES, Nov. 12, 1991, at A15.

110. THE WEEK IN GERMANY, Nov. 22, 1991, at 1.

Indigenous Peoples' Rights: *Mabo and Others v. State of Queensland*[1] — The Australian High Court Addresses 200 Years of Oppression

GERALD P. MCGINLEY

I. INTRODUCTION

Australian Aboriginals share the common heritage of indigenous peoples. It is a history of violent dispossession, followed by alternating neglect and paternalism, culminating in belated and bewildered concern.[2] An international movement has evolved to rectify these wrongs.[3] 1993 is to be the International Year of the World's Indigenous Peoples[4] during which

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1. Mabo v. Queensland, 107 A.L.R. 1 (1992).

2. *See* JANINE ROBERTS, MASSACRES TO MINING 13-19 (1981)[hereinafter ROBERTS]; MARC GUMBERT, NEITHER JUSTICE NOR REASON 15-25 (1984); HENRY REYNOLDS, DISPOSSESSION (1989)[hereinafter REYNOLDS]. For a discussion of the history and problems of other indigenous peoples, see Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991)[hereinafter Torres].

3. There have been three areas of activity. The International Labour Conference has produced two conventions, Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247. In 1989, the Conference adopted a revised version of Convention 107 (Convention 106). *See* Berman, *The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988* THE REVIEW 48, 49 (Int'l Convention Jurists 1988); Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 717-20 (1990). Second, in 1972 the U.N. Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur on the problems of discrimination against indigenous people. The Rapporteur, Jose Martinez Cobo presented a final report in 1983. *See Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub2/Add. 1-4 (1986-87)[hereinafter *Cobo Report*]. In 1985 the U.N. General Assembly established the U.N. Fund for Indigenous Populations to assist representation of indigenous populations in the activities of the Working Group. The Fund was established by G.A. Res. 40/131. *See Report of the Economic and Social Council: United Nations Voluntary Fund for Indigenous Populations, Report of the Secretary General*, U.N. GAOR 43rd Sess., Agenda Item 12, U.N. Doc. A/43/706 2 (1988). The third area of activity has been the work of non-governmental organizations. The first meeting of the World Council of Indigenous Peoples met in Canada in 1975; representative groups are the Four Directions Council, the Maori Council, the National Aboriginal and Islander Legal Service Secretariat, the National Indian Youth Council, the Indigenous World Association, the International Indian Treaty Council, The Indian Council of South America and the Inuit Circumpolar Conference. *See The Rights of Indigenous Peoples*, U.N. Center for Human Rights, Geneva, Fact Sheet No. 9, 3-4 (1990); Torres, *supra* note 2, at 151.

4. G.A. Res. 45/164 of 18 Dec. 1990; *see* U.N. Doc. E/CN.4/Sub.2/39 (1991); *see also*

the United Nations Working Group on Indigenous Peoples[5] will present its Declaration on the Rights of Indigenous Peoples[6] for adoption by the United Nations. In Australia the Commonwealth government has established the Council for Aboriginal Reconciliation[7] and a Royal Commission into Aboriginal deaths in custody.[8] A treaty between the Commonwealth government and the Aboriginal people has also been proposed.[9]

On the judicial front, in recent years, Aboriginal litigants relying on the *Western Sahara* case[10] have challenged the long standing assumption that Australia was occupied by peaceful possession of *terra nullius*. Rather, they argue that sovereignty was acquired by conquest. This has important legal consequences. In settled colonies (occupation of *terra nullius*) applicable English laws are automatically in force on settlement because there are no pre-existing laws (or rights), whereas conquered or ceded colonies retain their indigenous laws until the new sovereign alters them.[11] It has generally been assumed that Australia was a settled colony, the laws of which did not recognize Aboriginal title.[12] As recently as 1979 in *Coe v. Commonwealth*[13] two members of the High Court were firmly of the view that it was fundamental to the Australian legal system that Australia was acquired by settlement and not by conquest.[14]

In June of 1992, in a watershed opinion, the Australian High Court in *Mabo v. Queensland* reversed prior authority, and held in a plurality decision that Australia was not *terra nullius* when occupied and that significant pre-settlement indigenous land rights continue to exist under the common law of Australia. All judges agreed the acquisition of sovereignty by the Crown was an act of State that could not be questioned in the municipal courts;[15] nor was it questioned that on gaining sovereignty the

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Reed Brody et al., *The 42nd Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 13 HUM. RTS. Q. 260, 286 (1991).

5. Established by E.S.C. Res. 1982/34, U.N. Doc. E/82 Supp. 1, at 26 (1982); Douglas Sanders, *The U.N. Working Group on Indigenous Populations*, 11 HUM. RTS. Q. 406 (1989).

6. *See Report of the Working Group on Indigenous Populations on its Ninth Session*, 43d Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/40/Rev.1, Ann.1, Rec. 33 (1991).

7. Council for Aboriginal Reconciliation Act, 127 AUSTL. C. ACTS 4685 (Cth. 1991).

8. The Commission handed down its report last year. *See* 1-11 ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY (1991).

9. *See* Garth Nettheim & Tony Simpson, *Aboriginal Peoples and Treaties*, 12 CURRENT AFF. BULL. 18 (1989).

10. Advisory Opinion No. 61, Western Sahara, 1975 I.C.J. 5 (Oct.16).

11. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES 108 (1978)[hereinafter BLACKSTONE].

12. Cooper v. Stuart, [1889] 14 App. Cas. 286; Randwick Mun. Council v. Rutledge, 102 C.L.R. 54 (1959); New South Wales v. Commonwealth, 135 C.L.R. 337, 438-9 (1975). *See also* Bryan Keon-Cohen, *The Makarrata: a Treaty within Australia between Australians*, 1985 CURRENT AFF. BULL. 5.

13. Coe v. Commonwealth, 24 A.L.R. 118 (1979).

14. *Id.* at 129 (Gibbs & Aicken, JJ., concurring). *See also* Coe v. Commonwealth, 18 A.L.R. 592, 596 (1978)(Mason J.); Re Phillips; Ex parte Aboriginal Development Commission, 72 A.L.R. 508 (1987).

15. Mabo, 107 A.L.R. at 20 (Brennan, J.); 72 (Deane & Gaudron, JJ.); 92 (Dawson, J.); 142 (Toohey, J.).

Crown acquired radical or absolute title to all lands in Australia,[16] meaning that under the tenure doctrine all land is held ultimately through the Crown.[17] The issue in the case was whether, as had always been assumed, the Crown had also acquired beneficial ownership over all lands, thereby extinguishing any pre-existing indigenous rights.

Justice Brennan (with whom Mason, C.J., and McHugh, J., concurred) held it to be an untenable position that Australia was occupied as uninhabited territory because its indigenous peoples were few in number and of such low social order that it would be idle to impute to them legal rights. The view that Australia was *terra nullius* was based on misinformation, was racially discriminatory and as such was not in keeping with contemporary international law or current Australian community values.[18] Although the acquisition of sovereignty by the Crown was not justiciable before municipal courts, the courts did have jurisdiction to determine the consequences of such acquisition under municipal law.[19] Justice Brennan considered that no territory inhabited by human beings could be thought to be *terra nullius* under the common law of Australia.[20] It followed from this that certain pre-settlement Aboriginal rights continued to exist under Australian law. Justices Deane and Gaudron, in a separate judgment, argued that the original act of State that acquired sovereignty and radical title to the lands of Australia did not indicate an intention to also acquire beneficial ownership over unoccupied lands, thereby extinguishing Aboriginal title.[21] Justice Toohey, in a separate opinion, agreed with Justice Brennan that it was unacceptable that inhabited land could be considered *terra nullius*.[22] His Honor thought, however, that if land was in fact occupied, as was much of Australia, the common law protected the indigenous rights of the occupiers.[23] Justice Dawson alone dissented. His Honor thought that under the common law it mattered not whether land was acquired by conquest, cession or settlement if the sovereign manifested an intention to acquire beneficial title to all lands.[24] According to Justice Dawson, nothing in the early history of Australia indicated any intent on the part of the sovereign to recognize Aboriginal rights.[25]

The Court was also divided on the implications that could be drawn from the decision on the rights of the Crown to extinguish the Aboriginal title thus recognized. Chief Justice Mason, and Justices Brennan, Dawson and McHugh held that, absent a clear and unambiguous statutory provision to the contrary, the Crown could extinguish the Aboriginal title with-

16. *Id.* at 93 (Dawson, J.).
17. *Id.*
18. *Id.* at 26-9 (Brennan, J.).
19. *Id.* at 20.
20. *Id.* at 28-9.
21. *Id.* at 73 (Deane & Guadron, JJ.).
22. *Id.* at 142 (Toohey, J.).
23. *Id.*
24. *Id.* at 368 (Dawson, J.).
25. *Id.* at 368-9.

out compensation. Justices Deane, Gaudron and Toohey held to the contrary.[26]

The case is important for what it has to say regarding the rights of indigenous peoples generally, the concept of *terra nullius*, the doctrine of intertemporal law, and the relationship of international law and municipal law.

II. FACTS OF THE CASE[27]

The action was commenced in the High Court[28] in 1982 by the plaintiffs who are Murray Islanders. Each of the plaintiffs claimed specific parcels of land on the Murray Islands. They claimed to hold the land either under traditional native title, or usufructuary rights over the land, or by way of customary title. The plaintiffs did not deny the Crown's sovereignty over the Islands nor its radical title to the land, but argued that the immemorial rights of the islanders had not been extinguished upon the acquisition of sovereignty. To accept this proposition it was necessary to find, first, that there were such pre-existing rights, which would not be the case if the Islands were considered *terra nullius,* and second, that the rights had not been extinguished by the Crown after annexation.

The Murray Islands of Mer, Dauar, and Waierlie lie at the eastern end of the Torres Strait. They cover an area of nine square kilometers and are occupied by the Meriam people, who are Melanesians and number no more than 1000. The Meriam people are gardeners living in small villages. Their society was one regulated by customs, taboo, sorcery and magic. European contact occurred initially at the end of the 18th century and continued sporadically through to the middle of the 19th century. In 1877 the London Missionary Society established its headquarters on Mer. The Imperial government in 1872 and 1875 passed the Pacific Islanders Protection Acts[29] in order to protect the islanders from blackbirders.[30] The 1875 Act expressly disavowed any territorial claims to the islands, although the Queensland authorities did exercise some de facto control over the islands in the 1870's. In 1879 the Queensland Legislature passed the Queensland Coast Islands Act and the Governor of Queensland acting under Letters Patent from the Crown, annexed the Murray Islands into the Colony of Queensland. The Letters Patent used for the 1879 annexation, however, was ineffective because the Queensland Colony's boundaries had been determined by Imperial legislation; it was therefore necessary to annex the islands by Imperial legislation. This was accomplished

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26. *Id.* at 7 (Mason, CJ. & McHugh, J.).

27. The facts of the case are taken from the judgment of Brennan J. *Id.* at 6-15.

28. Mabo v. Queensland (High Crt of Aust., Brisbane Office of the Registry, No. B12 of 1982). The case was remitted to the Queensland Supreme Court for a determination of facts.

29. 35 and 36 Vict. Acts c 19; 38 and 39 Viv c 51.

30. The term used for a person or vessel engaged in kidnapping blacks or Polynesians for slavery.

by the Colonial Boundaries Act of 1895 (Imp).[31] In *Wacando v. Commonwealth*[32] the High Court rejected an argument that procedural discrepancies had prevented the annexation of the Islands.

In 1985 the government of Queensland attempted to abort the *Mabo* case with the Queensland Coast Islands Declaratory Act. This Act purported to declare retroactively that the intention of the Queensland Coast Islands Act of 1879 was not only to acquire sovereignty, but also to extinguish native title, assuming such title existed. The Act was challenged in *Mabo v. Queensland*[33] where a majority[34] of the High Court held that the Act offended section 10(1) of the Commonwealth's Racial Discrimination Act (1975) which makes ineffective legislation that prevents racial or ethnic groups from enjoying rights, as defined by Art. 5(d) of International Convention on the Elimination of All Forms of Racial Discrimination,[35] that are enjoyed by other racial or ethnic groups.[36] For the purposes of the litigation, the High Court assumed that the rights claimed by the Meriam people existed, confining themselves to the issue of whether those rights had been extinguished by the Queensland Coast Islands Declaratory Act.

Proceedings in the Queensland Supreme Court to determine the issue of fact were finalized in November 1991 and the matter came once again before the High Court. The various judgements of the Court cover some 170 pages. As is apparent from the, facts the Court could have confined itself solely to the issue of the status of the Murray Islands. As Justice Brennan stated:

> This court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aboriginals whose claims were "utterly disregarded" by the existing authorities or the court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not.[37]

The Meriam people are different from mainland Australian Aboriginals in their social organization, culture, racial background and co-

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31. 58 & 59 Vict. c 34.

32. Wacando v. Commonwealth, 148 C.L.R. 1 (1981).

33. Mabo v. Queensland, 63 A.L.J.R. 84 (1988).

34. Deane, Brennan, Toohey, and Gaudron, JJ. (Mason C.J., Dawson and Deane, JJ. dissenting).

35. International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195.

36. 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, a person of a particular race, color or national or ethnic origin do not enjoy a right that is to be enjoyed by persons of another race, color or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, color or national or ethnic origin, then notwithstanding anything in that law, persons of the first mentioned race, color or national or ethnic origin, shall by force of this section shall enjoy that right to the same extent as persons of that other race, color or national or ethnic origin.

37. Mabo, 107 A.L.R. at 27.

lonial experience.[38] Moreover, it could be argued that the 1872 and 1875 Pacific Islanders Protection Acts strongly suggest that the Islands were not considered *terra nullius* by the British authorities. Commenting on such treaties of protection in the *Western Sahara* case,[39] Judge Hardy Dillard noted, "you do not *protect* a *terra nullius*." All of the judgments in *Mabo*, however, rejected the approach of confining the case to the status of the Murray Islands. Justice Dawson agreed that the status of the Murray Islands could not be determined without first establishing the intention of the Crown with regard to New South Wales. The colony of Queensland inherited the laws of New South Wales, and it was the laws of Queensland that were introduced on the annexation of the Murray Islands. It was, therefore, unnecessary to determine whether the Murray Islands were conquered, ceded, or settled territory, as the Crown had expressly declared the law to be applied to Queensland and hence the Murray Islands on the occupation of New South Wales.[40]

A. *The Occupation of Australia as Terra Nullius*

Early international law writers were divided on the question whether territory inhabited by indigenous peoples could be considered *terra nullius* for the purpose of occupation. Francisco Vitoria,[41] Grotius,[42] and Blackstone[43] thought that occupied land could only be acquired by conquest or cession. Vattel[44] gave limited recognition of sovereignty to native peoples while Hyde,[45] Oppenheim[46] and Lindley[47] denied recognition of sovereignty to those whom they classified as backward people. After an extensive survey of relevant publicists Lindley concluded that:

> [E]xtending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in possession of any backward peoples who are politically organised ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the terri-

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38. *See* Beckett, *Ownership of Land in the Torres Strait Islands, in* ABORIGINES, LAND AND LAND RIGHTS 202-206 (Nicolas Peterson & Marcia Langton eds., 1983).

39. Western Sahara, 1975 I.C.J. at 124.

40. 107 A.L.R. at 106.

41. FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI RELECIONES 127-28 (J. Bates trans., 1917)(1964).

42. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 550 (F. Kelsey trans., 1925).

43. BLACKSTONE, *supra* note 11, at 107-8.

44. 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 85 (Charles Fenwick trans., 1964).

45. 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 175 (1922).

46. LASSA OPPENHEIM, INTERNATIONAL LAW 383-84 (3d ed. 1920).

47. MARK FRANK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 80 (1926).

> tory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights.[48]

John Westlake argued in 1910 that because indigenous societies were unable to supply a government suitable for the protection of white men they could not be given international status.[49]

International Tribunal Awards in the 1920s and 1930s similarly did not recognize indigenous territorial rights.[50] Even when the land was ceded or conquered and there was a treaty between the indigenous peoples and the colonial power, the treaty had little impact in international law. Max Huber in the *Islands of Palmas* case said of such treaties that, "they are not in the international law sense, treaties or conventions capable of creating rights and obligations."[51]

It was not until 1975 in the *Western Sahara* case that an international tribunal raised doubts about the question whether land occupied by indigenous people could be considered *terra nullius*. Vice President Ammoun in his Separate Opinion considered that the concept of *terra nullius* had been employed at all periods to justify conquest and colonization and as such stood condemned.[52] The majority thought, however, that territory was not *terra nullius* if it were occupied by peoples having "social and political organization."[53] This seems to suggest that the Court considered that there might be territory where the inhabitants do not have such organization and as such is *terra nullius*.

The history of the concept of *terra nullius* and indeed the *Western Sahara* case itself illustrates a continuing conflict between lofty ideals and the practical reality of greed and acquisition. It is an irony that the Court's Opinion in the *Western Sahara* case, on which Justice Brennan relies, that the peoples of the Western Sahara were entitled to self-determination was ignored by Morocco and Mauritania, who divided the area between themselves.[54]

The early history of Australia shows a similar conflict between the

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48. *Id.* at 20.

49. J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141-143 (1920).

50. Legal Status of E. Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53; Islands of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (1928); Cayuga Indians (Gr. Brit. v. U.S.), 6 R.I.A.A. 173 (1926).

51. Islands of Palmas Case, 2 R.I.A.A. at 858. He did not think, however, that they were totally without effect internationally in that fulfillment of the obligation may be a basis for determining whether the colonial power was exercising suzerainty for the purposes of recognition of sovereignty by other states. This point will be returned to later in the text.

52. Western Sahara, 1975 I.C.J. at 86.

53. *Id.* at 39.

54. In 1978 Mauritania formally renounced its claims to the Western Sahara and the entire area was taken over by Morocco. For a general account of the conflict, see J. DAMIS, CONFLICT IN NORTH-WEST AFRICA: THE WESTERN SAHARA DISPUTE (1983). *See also* Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694 (1976).

pious hopes of high government officials and the actual practices of the settlers. Captain Cook, when he visited the east coast of Australia in 1768, was given instructions to show the natives, "every kind of civility and regard [and] . . . also *with the consent of the natives* to take possession of convenient situations in the country."[55] Arthur Phillips, when he was commissioned to sail the first fleet to Botany Bay, was instructed to treat the natives with kindness and punish those who unnecessarily interrupted them in their occupations. He was also commissioned to grant away lands that were in the Crown's power to dispose of. No direct mention was made, however, of Aboriginal land rights.[56] As late as 1839 Lord Russell at the colonial office wrote in a despatch to Governor Gipps in Australia, "it is impossible that the Government should forget that the original aggression was our own, and that we have never yet performed the sacred duty . . . to impart to the former occupiers of New South Wales the blessings of Christianity, or the knowledge of the Arts and advantages of civilized life."[57]

Although he found inhabitants, Cook did not seek nor obtain their consent when he claimed possession of half the Australian continent in 1770.[58] After this there followed a period of dispossession, conflict and extermination.[59] The statement of Mr. Lesina, the Member of Parliament for Clermon in Queensland in 1901, reflected a typical view at the turn of the century:

> I do not think there is any necessity why we should step out of our way to preserve the aboriginal population . . . the aboriginal population of this country must eventually disappear entirely. . . . The law of evolution says that [they]. . .shall disappear in the onward progress of the white man.[60]

Under these circumstances the High Court in *Mabo* was faced with a monumental task in logically holding that Australia was not viewed as *terra nullius* when first occupied and moreover, that aboriginal rights continue to subsist.

Justice Brennan thought that if the Crown did have exclusive ownership of all the land in Australia it would mean that the common law extinguished the land rights of the indigenous people on the first settlement thereby exposing them to:

> deprivation of the religious, cultural and economic sustenance which

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55. *Secret Instruction Book of the British Admiralty in* JOHN BENNETT & ALEX CASTLES, AN AUSTRALIAN LEGAL HISTORY 253-254 (1982)[hereinafter BENNETT & CASTLES].

56. 1 BARTON, HISTORY OF NEW SOUTH WALES FROM THE RECORDS 483 (1989).

57. Despatch No. 62 Lord Russell to Gipps, 21 Dec. 1839 [H.R.A., (1924), i20.439, at 440], *cited in* Mabo v. Queensland, 107 A.L.R. 1, 108 (Dawson, J.).

58. BENNETT AND CASTLES, *supra* note 55.

59. HENRY REYNOLDS, THE OTHER SIDE OF THE FRONTIER 64-95 (1981); ROBERTS, *supra* note 2, at 13-19.

60. *Quoted in* ABORIGINAL LAND RIGHTS : A HANDBOOK 109 (Nicolas Peterson ed., 1981). *See also* REYNOLDS, *supra* note 2, at ch. 4.

> the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by civilized standard, such law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.[61]

While accepting that acquisition of territory by a state for the first time cannot be challenged in the courts, Justice Brennan thought that the courts could determine the consequences of acquisition of sovereignty under local law; that the courts could determine the body of law that is in force in the new territory. This depended on the manner of its acquisition. How a state acquired territory was governed by international law. The common law, in accordance with the manner of acquisition, determined the body of law that applied in the new territory.

His Honor considered acquisition of territory by way of the enlarged doctrine of *terra nullius*: namely, that states could acquire territory by discovery and occupation, although the territory had an indigenous population provided that the Aboriginal inhabitants were not organised in a society that was united for political action. The enlarged doctrine of *terra nullius*, however, created problems in determining what law was to be applied to an occupied territory. Blackstone,[62] for example, was unable to declare any rule by which the common law became part of territory acquired by occupation that was not uninhabited. Justice Brennan therefore, came to the conclusion:

> It is one thing for our contemporary law to accept that the laws of England . . . became the laws of (Australia). . . . It is another thing for our contemporary law to accept that when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. . . . The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory.[63]

His Honor then considered the status of the enlarged theory of *terra nullius* in international law. Referring to the *Western Sahara* Opinion, particularly that of Vice President Ammoun, he concluded that the enlarged notion of *terra nullius* no longer commanded general acceptance.[64] It followed from this that

> [i]f the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of

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61. 107 A.L.R. at 18 (Brennan, J.).
62. BLACKSTONE, *supra* note 11, at 107.
63. 107 A.L.R. at 26 (Brennan, J.).
64. *Id.* at 28.

> the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is 'idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in the past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[65]

Thus Justice Brennan's reasoning is, first, that a law based on mistaken facts should have no application if it leads to racial discrimination and, second, that as international law no longer accepts the enlarged doctrine of terra nullius, the current doctrine should be applied in order to protect indigenous human rights. This second proposition appears to apply the international law doctrine of intertemporal law to the law of Australia.

In the *Islands of Palmas* case[66] Max Huber considered that for occupation to be effective the Sovereign had not only to show that sovereignty was acquired in accordance with international law, but also that it was maintained in accordance with developing international law.[67] Justice Brennan does not question the Crown's acquisition of sovereignty. However, the rejection of the expanded concept of *terra nullius* has, for practical purposes, diminished what would have been the entitlements of the Crown under what was thought to be the international and common law at the time of occupation. As this is achieved by incorporation of contemporary international law standards into Australian domestic law, two questions can be asked: Is the standard applied by Justice Brennan in fact the contemporary standard? Second, would international law apply the contemporary standard of *terra nullius*? In other words is intertemporal law applicable in this situation?

Insofar as the first question is concerned, it is not at all clear that the *Western Sahara* case rejects the expanded notion of *terra nullius* as part of current international law. The Court, in its Advisory Opinion, seems to adopt an evaluative test in determining whether the nomadic tribes of the Western Sahara satisfied the relevant test. The Court concluded, "[i]n the present instance . . . at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were *socially and politically organized in tribes and under chiefs competent to represent them.*"[68] Justice Brennan rejects any test of social or political evaluation as being racially prejudicial and as such inconsistent with international law. His position accords with that of Vice President Ammoun, who would have

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65. *Id.*
66. Island of Palmas, 2 R.I.A.A. 829.
67. *Id.* at 839.
68. Western Sahara, 1975 I.C.J. at 39 (Emphasis added).

excluded from the concept of *terra nullius* any inhabited territory.[69]

The *Western Sahara* case was decided in 1975. Since the 70's, however, numerous declarations,[70] studies,[71] working groups,[72] and state policies dealing with indigenous concerns[73] suggest that an indigenous norm is in the process of emerging for the protection of indigenous rights, including land rights. One focus of this norm relates to the classification of territory occupied by indigenous people as *terra nullius*. The Indigenous Nongovernmental Organizations submitted to the Working Group on Indigenous Populations Fifth Session a draft declaration asserting that, "[d]iscovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples."[74]

While one might say that a norm is emerging regarding indigenous peoples' land rights and an aspect of this norm is the rejection of the enlarged doctrine of *terra nullius*, can one say that it has emerged so as to reject the expanded notion of *terra nullius*? In the development of international law there is that shadowy period when non obligatory state

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69. *Id.* at 86. It should be noted that some of the judges expressed doubts concerning the relevance of the *terra nullius* question to the case in that none of the involved parties had claimed that the Western Sahara was *terra nullius*. *See id.* at 74-75 (Gros, J.); 113 (Petren, J.); 123 (Dillard, J.).

70. *See Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/476/Add.4 (1981): Resolutions of the Inuit Circumpolar Conference, Annex 1; the Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere prepared by the International Non-Governmental Organizations Conference on the Discrimination against Indigenous Populations, Annex IV; Resolutions of the First Congress of the Indian Movements of South America, Annex V; Conclusions and Recommendations Regarding the Rights of Indigenous People by the Seminar on Human Rights in Rural Areas of the Andean Region, Annex VI; Recommendations of the Forth Russell Tribunal on the Rights of the Indians of the Americas, Annex VII. The San Jose Declaration of 1981, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/21/Add.3, 25 (1983). The Declaration of Principles Adopted by Indigenous Peoples at a prepatory meeting in Geneva, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations, Report of the Working Group on Indigenous Populations in its Fifth Session*, 39th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/22 Annex V (1987). *U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Discrimination Against Indigenous Populations, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/33 (1989).

71. *See Study of the Problem of Discrimination Against Indigenous Populations, Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/7 Add. 1-4 (1986); *see also* ROXANNE ORTIZ, INDIANS OF THE AMERICAS (1984).

72. In 1982 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities established the Working Group on Indigenous Populations.

73. *See generally* Torres, *supra* note 2.

74. INDIAN LAW RESOURCE CENTER ET AL., DRAFT DECLARATION OF PRINCIPLES, *reprinted in Report of the Working Group on Indigenous Populations on its Fourth Session*, U.N. Doc. E/CN.4/Sub.2/22 Add.1 (1985).

practice becomes a binding rule of international law. In this process municipal courts have an important role to play; perhaps an even greater role than the international tribunals. Somewhere along the line an indication of the obligatory nature of the rule must be established. Without action at this crucial stage international law cannot advance. Lord Justice Nourse in the *Tin Council* case[75] articulated the appropriate course for a municipal court where an international rule had not solidified:

> An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or to some usage, custom or general principle of law recognized by all civilized nations. The authorities show that where it is necessary for an English court to decide such a question . . . [it] must do so; being guided by municipal legislation and judicial decisions, treaties and conventions and the opinions of international jurists; and, where no consensus is there found by those opinions which are most nearly consistent with reason and justice.[76]

This dynamic role is imperative in matters involving human rights. This is because the claimants often have no means of bringing their cases before international tribunals or forums where the existence of a norm of international law may be established. In such situations it is the municipal courts who must bear the burden of articulating the norm of international law. Moreover, in the case of indigenous peoples' rights, the courts of a state with a large indigenous population, such as Australia, have a particular obligation to articulate the international standard concerning such people.[77]

In determining the second question, whether intertemporal law would apply, the decision of the Court in the *Western Sahara* case is of little help. The Court there considered itself bound by the question put to it by the General Assembly to decide the *terra nullius* question according to the law in force at the time of colonization.[78] Justice Brennan's intertemporal approach, however, does find support in the separate opinions of Judges De Castro and Forester. De Castro argued that changes to facts and changes to law could not be ignored in the *Western* Sahara case:[79] "whatever the existing legal ties with the territory may have been at the time of colonization by Spain, legally those ties remain subject to intertemporal law. . . ."[80] Judge Forster similarly thought that the Opin-

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75. Maclaine Watson & Co. v. Dept. of Trade, [1988] 3 W.L.R. 1033.

76. *Id.* at 107.

77. As De Visscher has said of the development of customary international law; "Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight . . . or because their interests bring them more frequently this way." CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (1960).

78. Western Sahara, 1975 I.C.J. at 38-9.

79. *Id.* at 169 (DeCastro, J.).

80. *Id.* at 171. Judge De Castro believed that the issue of *terra nullius* and existing ties should have been considered independently.

ion of the Court minimized, "the social and temporal context of the problem."[81] Philip Jessup, commenting on Huber's conception of intertemporal law, found it "highly disturbing" that a state's title to territory might be affected by the development of international morality. "Every state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a re-acquisition."[82] Jessup was concerned about a state losing its sovereignty over territory by virtue of a new rule of international law. This is clearly not the situation here. The doctrine, however, is of general application to customary international law and is not confined solely to the acquisition of territory.[83]

Brownlie[84] and other writers[85] have pointed out that the concern expressed by Jessup, while correct in theory, rarely has a practical effect. This is because the doctrines of acquiescence, prescription and desuetude will limit its application. Also, "inter-temporal law has never been applied where a change in the law has come about in a short time."[86] With regard to this latter point it can be said that, from the time of the writings of Vitoria and Blackstone, the extended doctrine of *terra nullius* has been questioned. Certainly since 1945, when the protection of indigenous peoples has been more prominently on the political agenda, acquisition by way of the extended doctrine has been under attack. With particular regard to Australia, the despatch of Lord Russell to Governor Gipps[87] indicated an awareness of the wrong done to the indigenous people of Australia and, as one does not perform acts of aggression against *terra nullius*, it seems relatively clear that since 1839 the idea that Australia was acquired as *terra nullius*[88] was a fiction. This is illustrated by the fact that the idea that Australia was settled as *terra nullius* was challenged in the Australian courts as early as 1836.[89] Under these circumstances it can hardly be said that the abandonment of the extended doctrine *terra nullius* occurred within a short time. Therefore, it seems that under the circumstances international law would call for the application of intertemporal law in the application of the *terra nullius* doctrine insofar as it relates to the rights of indigenous peoples.

One final question relating to this aspect of Justice Brennan's judgment is the applicability of intertemporal law to municipal systems. This

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81. *Id.* at 103 (Forster, J.).

82. Philip Jessup, *The Island of Palmas Arbitration*, 22 AM. J. INT'L L. 735 (1928). *See also* R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 30 (1963); W. VERFELT, THE MIANGAS ARBITRATION 14, 149 (1933).

83. T.O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980)[hereinafter Elias].

84. I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 132 (1973).

85. Elias, *supra* note 83, at 286-287.

86. A. ROCHE, THE MINQUIERS AND ECREHOS CASE 83 (1959).

87. *See* text accompanying note 57.

88. Western Sahara, 1975 I.C.J. at 124.

89. R. v. Murrell (1836) Legge 72.

was raised indirectly in the United States,[90] the United Kingdom[91] and the Federal Republic of Germany[92] in cases involving the applicability of the absolute theory of sovereign immunity as opposed to the more recently developed restrictive theory. In each case the court indicated that it would apply the current rule of international law although, in the common law jurisdictions, there was prior authority adopting the absolute theory into their law.

While Justice Brennan supported his decision with the incorporation of contemporary international law standards of *terra nullius* into Australian law, Justices Deane and Gaudron in their separate opinion, adopt an approach more in line with the first strand of Justice Brennan's opinion. They agreed that the acquisition of sovereignty was unchallengeable in the municipal courts and also that the common law determined the law applicable after acquisition; and, referring to United Kingdom authority,[93] they concluded that the common law of the time did recognize indigenous title if the territory was occupied. Then after reviewing the historical data they conclude that the act of State establishing sovereignty over Australia indicated nothing more than an intention to assert radical title to land in Australia:

> [I]t seems to us to be simply not arguable that there was anything in the act of State establishing the Colony which constituted either an expropriation or extinguishment of any existing native interests in the vast areas of land in the new Colony or a negation or reversal of the strong assumption of the common law that such native interests were respected and protected under the law. . . .[94]

Their Honors explain the absence of any specific reference to Aboriginal title in the early documents on the basis that because of a lack of information regarding the inhabitants generally,

> it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any existing interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals.[95]

While subsequent acts of dispossession might explain an ambiguity in the original claim to sovereignty, subsequent acts could not do so when, as in the case of the Australian settlement, there was no ambiguity regarding the relevant act of State.[96]

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90. Alfred Dunhill v. Republic of Cuba, 425 U.S. 682 (1976).

91. Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356, *reprinted in* 16 I.L.M. 471 (1977).

92. Nonresident Petitioner v. Central Bank of Nigeria, 16 I.L.M. 501 (1977).

93. Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 App. Cas. 408; Amodu Tijani, [1921] 2 App. Cas. 409, 410.

94. Mabo, 107 A.L.R. at 73.

95. *Id.* at 74.

96. *Id.*

Justice Toohey in his separate opinion adopted a slightly different approach. He agreed with Justice Brennan that it was unacceptable that land which is in regular occupation should be regarded as *terra nullius*.[97] However, His Honor thought that the doctrine of *terra nullius* had no application to the case. He argued that because the land was in fact occupied by the Aboriginal people when the Crown obtained sovereignty, the Crown could only obtain radical title to occupied land, this regardless of any intentions it mights have had to the contrary:

> Immediately on acquisition indigenous inhabitants became British subjects whose interests were to be protected in the case of a settled colony by the immediate operation of the common law. The Crown did not acquire a proprietary title to any territory except that truly uninhabited.[98]

These aspects of the judgements are concerned with interpreting historical data by way of present mores and information concerning indigenous people. The International Court in the *Western Sahara* case in deciding the status of the territory at the time of occupation took a similar approach and was able to look at information regarding the Western Sahara's legal status and legal ties at other times, if this shed light on the initial occupation.[99]

Justices Deane and Gaudron, in their judgment, suggest that if the Crown officers had been aware of the numbers of Aboriginals on the Australian continent, and the sophistication of their culture and social organization, they would not have considered the territory *terra nullius*. As they had no such information, and as there was a strong common law presumption protecting indigenous title, the act of State acquiring sovereignty only extended to the extent of acquiring radical title. The content of the Sovereign's intention is therefore supplied with hindsight based on accurate information as to Aboriginals and their society.

Justice Toohey's position was that the Sovereign's intention at the time was irrelevant if the land was in fact occupied. He then employed current information regarding Aboriginals and their relationship to the land to show that the land was in fact occupied on settlement and therefore protected by the common law.

Justice Dawson dissented. He thought that the issue of whether territory is classified as ceded, conquered, or settled was irrelevant for municipal law purposes where the new law which is introduced is expressly declared by the new Sovereign.[100] In Australia, the sovereign had no intention to preserve Aboriginal title:

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97. *Id.* at 142. His honor also thought that the idea that land which was not in regular occupation was *terra nullius* needed great scrutiny. The failure of people to remain in one spot may be due to the harshness of the climate rather than a lack of attachment to the land. *Id.* at 141.

98. *Id.* at 142.

99. Western Sahara, 1975 I.C.J. at 38.

100. 107 A.L.R. at 106 (citing Cooper v. Stuart, [1889] 14 App. Cas. 286, 291).

> Upon any account, the policy which was implemented and the laws which were passed in New South Wales make it plain that, from the inception of the colony, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. It simply treated the land as its own to dispose of without regard to such interests as the natives might have had prior to the assumption of sovereignty. What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of native title.[101]

After considering the historical data, including the early instructions to governors, the dispossession of the Aboriginal people of their land, and the creation of reservations, His Honor concluded:

> [T]here may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account. The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.[102]

In this regard Justice Dawson agrees with Justice Brennan in that the actual intention of the Sovereign on occupation was to claim all beneficial ownership of the land in Australia. The difference is that Brennan simply would not give effect to such an intention based as it was on incorrect information. As the relevant intention is colored with the knowledge or lack thereof of Aboriginal culture and numbers together with racial prejudices prevalent at the time, it is relatively clear that the Crown did intend to occupy the Australian continent as *terra nullius*. The intent is manifest if one compares the instructions of Lord Normanby, the Secretary of State for War and the Colonies, to Captain Hobson, the Crown negotiator with the New Zealand Maori people — a territory not considered *terra nullius* — with those of the Crown officers occupying New South Wales:

> [The Crown] disclaims . . . every pretension to seize on the Island of New Zealand, or to govern them as part of the Dominion of Great Britain, unless free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained. . . .All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern

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101. *Id.* at 106-7.

102. *Id.* at 111. For an account of legislative attempts to reject the terra nullius application to Australia, see Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 743 (1990).

> your transactions with them for the recognition of Her Majesty's Sovereignty of the Islands. . . . The acquisition of Land by the Crown for future settlement . . . must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves.[103]

In holding that the intention at the time of settlement was not to occupy as *terra nullius* Justices Deane and Gaudron were able to further hold that the present indigenous rights were not extinguishable by the Crown without compensatory damages. Justice Toohey reached the same conclusion by a different route. The majority, however, thought that Crown could extinguish the native title. This raises the question of whether *Mabo* is yet another instance of "Indian giving". One more empty promise. To answer this it is necessary to consider the nature of the interest recognized and the extent to which it can be protected.

B. *The Implications of Mabo*

1. The Nature of Indigenous Title

In determining whether the Aboriginal people retained presettlement rights and interests in their land, Justice Brennan thought that the court could adopt contemporary notions of justice and human rights if in so doing it did not fracture the skeleton of principles which gave the common law its shape and consistency.[104] By this His Honor apparently meant the recognition of the indigenous interest might run afoul of an essential doctrine of the common law. An essential doctrine in part being indicated by whether, if a rule were to be overturned, the disturbance to the law would disproportionate to the benefit achieved.[105]

His Honor considered the doctrine of tenure to be an essential doctrine of the common law.[106] Recognizing that the Crown only acquired radical title in the land, so that beneficial ownership lay with the indigenous title holders, would not fracture the tenure doctrine. The recognition of radical title in the Crown was quite consistent with the recognition of native title to land, radical title was necessary for when the Crown exercised its sovereign power to grant or to appropriate land within its territory. Unless this sovereign power is exercised in one of these ways there was no reason why land within the Crown's territory should not continue to be subject to native title.[107]

> It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition

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103. Normanby to Hobson, 14 Aug. 1839, CO 209¼, 251-81. *See also* SPEECHES AND DOCUMENTS ON NEW ZEALAND HISTORY 10 (William David McIntyre & W.J. Gardner eds., 1971).

104. 107 A.L.R. at 29.

105. *Id.* at 19.

106. *Id.* at 31.

107. *Id.* at 35-6.

> of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.[108]

In *Milirripum v. Nabalco Pty. Ltd.*,[109] Justice Blackburn of the Supreme Court of the Northern Territory had held that the Aboriginal relationship with their land was not of a proprietary nature. This was because, while the Aboriginals felt that they had obligations towards the land, it was not an economic relationship whereby they could exclude others or alienate the land.[110] Justice Brennan thought Aboriginal title constituted a proprietary interest when it was possessed by a community that was in exclusive possession of land. It did not matter whether or not the land belonged to individuals in the community so long as the community effectively asserted that none but its members had the right of occupancy or use of the land. Justice Brennan rejected the view in *Milirripum* that alienability was an essential indicia of a proprietary interest. The fact that individual members of a group enjoyed usufructuary rights over land did not mean that the Aboriginal community or group did not have a proprietary interest, which was a burden on the radical title of the Crown.[111]

The Aboriginal title, which survived the past 200 years were those where the clan or group had continued to observe, as far as practicable, the laws and customs based on the traditions of the group so that the connection with the land was maintained.[112] If the clan or group no longer practiced the customs, then the foundation of the native title had been abandoned, and could not be revived. Full title had vested in the Crown.[113]

Insofar as alienability was concerned Aboriginal title could not be acquired from an indigenous people by one who not being indigenous could not acknowledge their laws and customs. Similarly, a right or interest cannot be acquired by a clan or group or member of an indigenous people unless the acquisition is consistent with the laws and customs of the people. Only the Crown can acquire native interest outside the laws and customs of the indigenous people, it being an incident of sovereignty that the Crown alone can accept the surrender of native title.[114]

The rights and interests recognized will be protected by the appropriate legal and equitable remedies of the common law and established by the evidence as to whether the right is proprietary or personal and usu-

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108. *Id.* at 31.
109. Milirripum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1971).
110. *Id.* at 270-73.
111. Mabo, 107 A.L.R. at 36.
112. *Id.* at 42.
113. *Id.* at 43.
114. *Id.*

fructuary; and whether it is possessed by community, group or individual.[115]

Justices Deane and Gaudron adopted a similar approach. They defined native title as being one where the interest under the local law or custom involved "an established entitlement of an identified community, group or [rarely] individual to the occupation or use of particular land and that entitlement . . . be of sufficient significance to establish a locally recognized [interest] between the particular community, group or individual and that land."[116] The entitlement may be one that correlates to common law notions of ownership, possession and property or it may not. If it does not correlate with a common law interest then it may either be transformed into an interest recognized by the common law or the common law may be modified so as to accommodate the new interest.[117]

Whatever the nature of the entitlement, however, it is a personal interest and not a legal or beneficial interest or estate in the land. Following from this it cannot be alienated outside of the native system except to the Crown; and it may be extinguished by a grant or other dealing with the land that was inconsistent with the common law native title.[118] As personal rights they can be extinguished by surrender to the Crown or may be lost by the abandonment of the connection with the land. Their Honors were not prepared to decide whether the interest would be lost by abandonment of the traditional customs and ways of the group. Their present feeling is that occupancy and use of the land sufficient to maintain the interest.[119]

Justice Toohey took the most radical approach to the nature of the indigenous title, starting from the premise that it is the presence of the indigenous people on the land that prevents the Crown from acquiring beneficial title. It follows from this that presence would be insufficient to establish title if it were coincidental or truly random, "having no connection with or meaning in relation to a society's economic, cultural or religious life." The use of the land must be meaningful as understood from the perspective of the society.[120] Referring to *Sac and Fox Indian Tribes v. United States*,[121] and *Hamlet of Baker Lake v. Minister of Indian Affairs*,[122] His Honor thought that the proof of occupancy should be by reference to the demands of the land and the society in question.[123] He did not think, however, that anything more than established occupancy at

115. *Id.* at 44.
116. *Id.* at 64.
117. *Id.* at 65-6.
118. *Id.* at 66.
119. *Id.* at 83.
120. *Id.* at 146.
121. Sac and Fox Indian Tribes v. United States, 383 F.2d 991, 998 (1967).
122. Hamlet of Baker Lake v. Minister of Indian Affairs, 107 D.L.R.3d 513, 544-45 (1979).
123. 107 A.L.R. at 147.

time of annexation was needed. His Honor did not see why "long prior" occupancy was necessary.[124] Nor was it necessary that occupancy be exclusive,[125] except insofar as was necessary to preclude indiscriminate ranging over land as a basis of title. If more than one band occupied the land each small group could be said to have title or it was vested in the larger society.[126] His Honor also thought that the inalienability of native title was open to question, and the characterization of native title as personal rather than proprietary, "fruitless" and "unnecessarily complex."[127] Justice Toohey thought that there was power in the Crown to extinguish traditional title, but there is some authority that suggests consent is required.[128]

Justice Dawson, in his dissent, acknowledged that the annexation of land did not bring to an end those rights which the Crown in the exercise of its sovereignty chooses to recognize.[129] His Honor thought that the indigenous interest need not correspond with common law notions of property.[130] The critical question for Justice Dawson was whether the Crown had accepted the indigenous title either expressly or impliedly. This was because once the Crown assumed radical title pre-existing title was held under the Crown and the Crown must accept that title.[131]

The judgments of the Court in *Mabo* advance the status of indigenous title in Australia to the extent that they now recognize that Aboriginal interests in land need not correspond with common law concepts of ownership. The extinguishment of Aboriginal interests by an assumed abandonment because of an absence from the land or the dismemberment of the group is inappropriate. First, it assumes that the connection with the land is primarily a physical one. Aboriginals may not have lived on their lands for years perhaps generations yet continue to have spiritual links with the land and its sacred sites. Also they may have been absent from their land due to misrepresentations, false promises and violence. The abandonment doctrine may ultimately protect only that land which the white settlers considered insufficiently valuable to be worth the effort of driving off the Aboriginal people, while at the same time disenfranchising those who are the most oppressed.

The restriction on alienability may be less significant than it appears. The indigenous title holders presumably can relinquish their title to the Crown in return for a grant back of the land in fee simple. Moreover, the

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124. *Id.* at 147-8. This was required in Hamlet of Baker Lake, 107 D.L.R.3d at 546.

125. *Id.* at 148 (citing United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 345 (1941)).

126. *Id.* at 48.

127. *Id.* at 151-2.

128. *Id.* at 151 (citing Worcester v. Georgia, 31 U.S. 350, 370 (1832)(the crown's title comprised, "the exclusive right of purchasing such lands as the natives were willing to sell").

129. *Id.* at 93-4.

130. *Id.* at 97.

131. *Id.* at 98-9.

right to exclude ordinarily includes the right to include. It would follow that the title holders could grant leases and licenses to their lands, but cannot alienate it completely. The inalienability of traditional title is a significant feature of the claims of indigenous people. The World Council of Indigenous Peoples identified as one of their irrevocable and inborn rights "inalienable, collective land ownership."[132]

2. The Crown's Power to Extinguish Indigenous Title

The defendant in *Mabo* argued that under the common law, pre-existing customary rights were extinguished unless expressly recognized by the Crown.[133] Justice Brennan considered the preferable rule to be that a change in sovereignty did not extinguish native title,[134] and that the indigenous inhabitants were in the same position as inhabitants of a conquered territory. In so holding, the Court overruled long standing authority to the contrary. This was necessary to prevent the continued discrimination against the Aboriginal people. Moreover, it also accorded with the reality of Australian history. The acquisition of sovereignty did not encompass beneficial ownership of the land. The Aboriginals were not dispossessed of their lands by such acquisition, but rather by recurrent exercises of paramount power to exclude the indigenous inhabitants from their lands as the colonies expanded.[135]

The acquisition of sovereignty, however, carried with it the power to create and extinguish private rights in the land. The courts could not review the merit of an extinguishment, only its legality. Following United States[136] and Canadian[137] authority, the exercise of the power must reveal a clear and plain intention to do so. Such an intention is not revealed by a law which merely regulates the enjoyment of title. Similarly, a law which reserves land from sale for the purpose of permitting the indigenous to enjoy the native title does not work an extinguishment.[138]

Justices Deane and Gaudron rejected the notion that native title was no more than permissive occupancy which the Crown was lawfully entitled to revoke or terminate regardless of the wishes of those living on the land.[139] This would give the indigenous people no real security as they

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132. Special General Assembly of the World Council of Indigenous Peoples: Declarations and Resolution, *reproduced in Cobo Report, supra* note 3.

133. 107 A.L.R. at 38 (citing Secretary of State for India v. Bai Rajbai, 42 I.A. 229 (1915); Vajesingji Joravarsingji v. Secretary of State for India, 51 I.A. 357 (1924); Secretary of State for India v. Sardar Rustam Khan, I.A. 356 (1941)).

134. 107 A.L.R. at 41.

135. *Id.*

136. United States v. Santa Fe Pacific R.R., 314 U.S. 339, 353 (1941); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).

137. Calder v. A.G. of British Columbia, 34 D.L.R.3d 145, 210 (1973); Hamlet of Baker Lake v. Minister of Foreign Affairs, 107 D.L.R.3d 513 (1979); Reg. v. Sparrow, 70 D.L.R.4th 385 (1990).

138. 107 A.L.R. at 48.

139. *Id.* at 67-68.

could be dispossessed at the whim of the executive.[140] Their Honors thought that if the Crown wrongfully extinguished native title it would be obliged to pay compensation.[141] As native title constitutes a legal right, the Commonwealth would be obliged to provide just terms for any acquisition. The Racial Discrimination Act also restrains the States and Territories from extinguishing or diminishing Aboriginal title.[142]

Justice Toohey thought that the Crown had the power to extinguish native title by clear and plain legislation.[143] His Honor, however, thought that there exists a fiduciary duty to ensure that traditional title was not impaired or destroyed without the consent or against the interests of the title holders.[144] Otherwise the title holders would be entitled to compensation.[145]

Chief Justice Mason and Justices McHugh[146] and Dawson[147] agreed with Justice Brennan on the power of the Crown to extinguish Aboriginal title without compensation. In practical terms the distinction may not be as great as it appears. The states may be able to extinguish native title with a grant to an Aboriginal group. Thus the government of South Australia vested in the Pitjantjatjara people some 102,630 square kilometers (more than a tenth of the states land area) of their traditional lands.[148] Such an exercise of power would probably extinguish native title. The legislation vesting the land was held in *Gerhardy v. Brown*[149] not to offend the Commonwealth Racial Discrimination Act because its purpose was to ensure adequate advancement of certain racial groups requiring protection under section 8(1) of the Commonwealth Act. Other acts by the states to extinguish title would probably violate the Act under the ruling of *Mabo v. Queensland*.[150] While the Commonwealth government has the power to extinguish Aboriginal title, it would now be politically unacceptable for it to do so. In this regard, the Australian Aborigines may find themselves better off than indigenous peoples whose lands were taken by cession or conquest.

III. CONCLUSION

Clearly the judgments of the various members of the Court indicate a strong desire to right the wrongs done to the Aboriginal people. The ap-

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140. Citing Attorney General for Quebec v. Attorney General for Canada, [1921] 1 App. Cas. 406; Nireaha Tamaki v. Baker, [1901] App. Cas. 576.

141. 107 A.L.R. at 84.

142. *Id.*

143. *Id.* at 152.

144. *Id.* at 156-60 (citing Delgamuukw v. British Columbia, 70 D.L.R.4th 185, 482 (1991); Guerin, [1984] 2 S.C.R. 384).

145. *Id.*

146. *Id.* at 7.

147. *Id.* at 96.

148. Pitjantjatjara Land Rights Act No. 20 of 1981.

149. Gerhardy v. Brown, 57 A.L.R. 472 (1985).

150. *See generally, supra* note 1.

proaches of the majority show a great deal of ingenuity in resurrecting rights thought dead and buried for some 200 years. The members of the Court, however, were hamstrung by precedent and a natural caution not to go too far. The implications of the case for Australian Aborigines are not clear. *Mabo* dealt with land rights. Indigenous people, however, claim many other rights.[151] If Australia is no longer to be considered as settled as *terra nullius*, how many other indigenous rights have survived? The answer to this question, in the judgment of Justice Brennan, will have to be found in the pre-existing rights and whether their recognition will fracture the skeleton of the common law. Presumably Justices Deane and Gaudron would answer the question according to the case law relating to conquered territory. In either case, the question is not easily answered. From an international perspective the decision must provide a profound impetus to the claims of indigenous peoples everywhere.

151. Professor Nettheim lists ten specific classes of indigenous claims: physical survival, cultural survival and cultural identity, sovereignty, self-determination, self-government, land rights, control of land and its resources, compensation, non-discrimination, and affirmative action. Garth Nettheim, *"Peoples" and "Populations" - Indigenous Peoples and the Rights of Peoples, in* THE RIGHTS OF PEOPLES 107, 116 (James Crawford ed., 1988).

Iraqi Crimes and International Law: The Imperative to Punish

LOUIS RENÉ BERES*

The United States now has a new president. If he should take his Constitutional obligations seriously, both the obligations of international and U.S. law, President Clinton will take the necessary steps to ensure prosecution of Iraqi crimes committed before, during, and after the recent Gulf War. The following essay examines these necessary steps against the background of the Nuremburg prosecutions and the associated concept of *nullum crimen sine poena*, no crime without a punishment.

In his opening statement at Nuremberg on November 21, 1945, Chief U.S. Prosecutor Justice Robert H. Jackson asked rhetorically: "Did we spend American lives to capture [twenty Nazi defendants] only to save them from punishment?"[1] Thus jurisprudentially dramatizing the imperative to prosecute wrongs he describes as calculated, malignant, and devastating.[2] It also highlighted the irony of other options wherein American custody would effectively shelter war criminals. Today, while still lacking custody over Iraqi perpetrators of Nuremberg category crimes, Americans should raise the same question about the 1991 Gulf War. Realizing the answer, this question could move us, as a nation, to give effect to the principle *nullum crimen sine poena* (no crime without a punishment).[3]

Recognizing the right of belligerents to punish as war criminals those who violate the laws or customs of war, Allied forces declared on November 1, 1943, that "atrocities, massacres and cold blooded mass executions

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1. RICHARD A. FALK, ET. AL., CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS AND SOLDIERS FOR CRIMINAL ACTS IN WARS 81 (1971); *See also* Benjamin B. Ferencz, *1 Defining International Aggression: The Search for World Peace* 437 (1975).

2. *See* FALK et. al., *supra* note 1, at 107. This imperative was reaffirmed in Principle I of The Nuremberg Principles (1946): "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." The Nuremberg Principles were later formulated by the International Law Commission, at the request of the General Assembly, in June-July 1950. Article 1: "Offenses against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished." Draft Code Of Offenses Against The Peace And Security Of Mankind, GAOR Supp., No. 9 (A/2693).

3. Punishment is, quite plausibly, the original meaning of justice, and is assuredly one of its most essential components. For a comprehensive consideration of these concepts, and their interdependence, see ROBERT C. SOLOMON AND MARK C. MURPHY, WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS (1990); *see generally* Haim H. Cohn, *On the Immorality of Punishment*, 25 ISRAEL L. REV., No. 3-4, 284-291 (1991).

which were being perpetrated by the Hitlerite forces. . ." should be the object of criminal prosecution and punishment.[4] With this Moscow Declaration, the three allied powers, the United States, the United Kingdom and the Soviet Union, announced that the 'minor' Nazi war criminals would be tried and punished by the courts of the lands where the crimes took place. As for the major criminals "whose offenses had no particular geographical location,"[5] punishment was to be the product of joint Allied judgment.

Between October 1943 and January 1944, the U.S. and the U.K. established a United Nations Commission for the Investigation of War Crimes, commonly known as the United Nations War Crimes Commission (UNWCC). The commission, meeting in London during 1944, compiled lists of war criminals. On August 8, 1945, the London Agreement and its accompanying Charter[6] provided the constitutional authority for an International Military Tribunal at Nuremberg. The law embodied in this Charter was "decisive and binding upon the Tribunal"[7] and provided that "the Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as member of organizations, committed any of the following crimes: (a) crimes against peace; (b) war crimes; (c) crimes against humanity."[8]

The results of the Nuremberg Trial of the Major War Criminals are now well-known. Among other things, the Tribunal explicitly rejected the idea that states are the only subjects of international law and declared authoritatively that *individuals* are punishable for crimes against international law.[9] As a practical matter, Germany had surrendered unconditionally, and the allies did not encounter any *legal* problems in gaining custody over the major Nazi criminals. How comparable, then, is Nuremberg[10] to the current situation concerning Iraqi crimes?[11] Primarily

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4. M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL W. INT'L L. J. 208 n.2 (1979), *citing Moscow Declaration*, 38 AM. J. INT'L L. 7 (Supp. 1944).

5. Bassiouni, *supra* note 4.

6. London Agreement of Aug. 8, 1945, with accompanying Charter, E.A.S. No. 472, 82 U.N.T.S. 284.

7. *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBURG, Judgment 218 (1947).

8. *Supra* note 6, art. 61. Crimes of war, crimes against peace and crimes against humanity are defined in the Charter at Article 6 (a), (b), (c).

9. According to the Judgment, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Supra* note 7, at 223.

10. *See Persian Gulf: The Question of War Crimes, Hearings Before the Comm. on Foreign Relations*, 102d Congress, 1st Sess., 17-20 (1991). (statement of Anthony D'Amato on the applicability of the Nuremberg precedent to Gulf War Iraqi crimes)[hereinafter D'Amato]. In this connection, Professor D'Amato stressed the "educational impact" of trials of Iraqi war criminals:

> The enormity of the crimes committed by various Iraqi leaders in the Persian Gulf War is a lesson that has to be brought home to the world day after day

because Iraq, unlike Germany, emerged from war unoccupied, it is improbable that a Nuremberg style tribunal could be convened within Iraq or that custody over Iraqi criminals could be gained without resort to forcible abductions. Nevertheless, the Principles of Nuremberg, formulated by the International Law Commission (ILC) and adopted by the United Nations General Assembly in 1950, bind all member states and should compel timely prosecution of Iraqi crimes against peace,[12] war crimes[13] and crimes against humanity.

What crimes were committed in the Gulf War?[14] Persistent and well-documented reports indicate truly horrendous crimes,[15] crimes so terrible

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> and week after week as the trial proceeds in it slowly deliberate way. A war crimes trial should not be today's news forgotten tomorrow. Rather, it should be one of the most fundamental lessons in civics that can be taught to the people of the world, especially young people. The lesson is that there is nothing glamorous about wars of aggression; that the people who wage such wars are the lowest form of criminals; and that they will be brought to justice just as common criminals are brought to justice in the courts of all civilized nations.

See also, William V. O'Brien, *The Nuremberg Precedent and the Gulf War*, 31 VA. J. INT'L L. 391-401 (1991). (Confirming view of the applicability of the Nuremberg precedent).

11. For a comprehensive consideration of Iraqi war crimes and prosecutorial options, *see generally* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351-380 (1991); Louis René Beres, *The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes*, 31 VA. J. INT'L L. 381-390 (1991); William V. O'Brien, *supra* note 10, at 391-402; and John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403-415 (1991).

12. Bassiouni, *supra* note 4, at 206. Cherif Bassiouni reports that "the first prosecution for initiating an unjust war is reported to have been in Naples, in 1268, when Conradin von Hohenstafen was put to death for that reason. *See also*, Remigiusz Bierzanek, *War Crimes: History and Definition, in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 559, 560 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

13. Bassiouni, *supra* note 4, at 206. Bassiouni also reports that the first international prosecution for war crimes was the prosecution of one Peter von Hagenbach in Breisach, Germany, in 1474 before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire. *See also* William H. Parks, *Command Responsibility for War Crimes*, 61 MIL. L. REV. 1, 4 (1973).

14. For documentation of Iraqi crimes, see Amnesty International News Release, "Iraqi Forces Killings (sic) and Torturing in Kuwait, Says Amnesty International Fact-Finding Team," AI Index: MDE 14/15/90. Distr. SC/PO (Oct. 3, 1990) (a preliminary report on widespread charges of Iraqi torture, willful killing, rape, pillage and collective reprisals); Amnesty International Report, "Iraq Occupied Kuwait Human Rights Violations Since 2 August," AI Index MDE 14/16/90. Distr. SC/CO/GR (Dec. 19, 1990). For personal testimonies of Iraqi brutalities, see *Letter from Kuwait*, N.Y. TIMES, Jan. 14, 1991, at A17; and Shafeeq Ghabra, *The Iraqi Occupation of Kuwait: An Eyewitness Account*, 20 J. OF PALESTINE STUDIES 78, 112-125 n.2. For further documentation, see *Crisis in the Persian Gulf: Sanctions, Diplomacy and War, Hearings Before the House Comm. on Armed Services*, 102d Cong., 1st Sess. 920 (1991); *Human Rights Abuses in Kuwait and Iraq, Hearings Before the House Comm. on Foreign Affairs*, 102nd Cong., 1st Sess. 192 (1991); *The Persian Gulf Crisis, Joint Hearings Before the Subcommittees on Arms Control, International Security and Science, Europe and the Middle East, and on International Operations, Committee on Foreign Affairs and the Joint Economic Committee*, 101st Cong., 2d Sess. 576 (1990).

15. Any indictments setting forth criminal charges against Saddam Hussein and other

that they mandate universal cooperation in apprehension and punishment. These crimes, what lawyers call *crimen contra omnes*, crimes against all, concern (1) barbarous and inhuman assaults against Kuwaitis and other nationals in Kuwait; (2) barbarous and inhuman treatment of coalition prisoners of war in Iraq and Kuwait; and (3) aggression and crimes of war against noncombatant populations in Israel and Saudi Arabia.[16] All of these grave breaches of international law are in addition to the original crime against peace[17] committed against Kuwait on August 2, 1990.[18] The United States and all other states bound by the 1949 Geneva

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unnamed defendants must identify violations, *inter alia*, of the following three authoritative codifications: *Convention Against Torture And Other Cruel, Inhumane Or Degrading Treatment Or Punishment*, G.A. Res. 39/46, U.N. GAOR 3d Comm., 93d plen. mtg., Annex, U.N. Doc. E/CN.4/1984/72 (1984); *International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR 6th Comm., 105th plen. mtg., Annex, Supp. No. 39, U.N. Doc. A/34/39 (1979); and *Resolution on Disappeared Persons*, G.A. Res. 33/173, U.N. GAOR, 3d Comm., 90th plen. mtg., U.N. Doc. A/33/509 (1978).

16. We must also add here Iraq's commission of new forms of environmental destruction and environmental manipulation as a form of warfare. The intentional dumping of millions of barrels of Kuwaiti and Saudi oil into the Gulf and the torching of Kuwaiti oil wells represent clear and egregious violations of Article 53 of the Fourth Geneva Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3553, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. *See also* International Convention for the Prevention of Pollution of the Sea by Oil, May 29, 1961, 12 U.S.T. 2989, 327 U.N.T.S. 3, (regarding Saddam Hussein's "Eco-Terrorism" against Kuwaiti oil wells).

17. Pursuant to the London Agreement of August 8, 1945, the indictment of the International Military Tribunal contained two counts concerning crimes against peace and was founded on the Kellogg-Briand Pact, the Stimson Note of 1932, the Geneva Protocol and the Resolutions of the Eighth Assembly of the League of Nations and the Sixth International Conference of American states. Moreover, the Weimar Constitution had stated that "generally accepted rules of international law" were part of German law and that the outlawry of aggressive war had been one of the "generally accepted rules of international law" in 1939. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

18. For crimes against peace, or waging aggressive war, see *Resolution on the Definition of Aggression*, Dec. 14, 1974, G.A. Res. 3314, 29 U.N. GAOR 142, Supp. No. 31, U.N. Doc. A/9631 (1974). For pertinent codifications of the criminalization of aggression, see also: The 1928 Kellogg-Briand Pact (Pact of Paris); Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57; U.N. Charter Article 2; Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T. S. No. 993, 1976 U.N.Y.B. 1043 (entered into force, Oct. 24, 1945); *The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, 20 U.N. GAOR 11, Supp. No. 14, U.N. Doc. A/6014, (1966); *The 1970 U.N. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR 121, Supp. No. 28, U.N. Doc. A/8028 (1971); *The 1972 Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons*, G.A. Res. 2936, 27 U.N. GAOR 5, Supp. No. 30, U.N. Doc. A/8730 (1972); *The Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art. 6, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279; and *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95, 1 U.N. GAOR 1144, U.N. Doc. A/236 (1946). *See also* The Convention on the Rights and Duties of States,

Conventions are obligated under international law to search out and prosecute, or extradite, individuals alleged to have committed grave breaches of these Conventions. According to Article 146 of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War):

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[19]

Between August 2, 1990, the date of Iraq's invasion of Kuwait, and October 29, 1990, the Security Council adopted ten resolutions explicitly condemning the Baghdad regime for multiple crimes of the gravest possible nature.[20] These *crimen contra omnes* crimes, which are so terrible that they mandate universal enforcement, jurisdiction and responsibility, cry out for legal prosecution even *absent* authorizing resolutions by the UN Security Council. This is because the prohibition of the now documented barbarous activities of Iraq falls under a "peremptory" rule of international law, which is an absolutely binding rule allowing no form of derogation whatsoever.[21]

Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (known generally as the "Montevideo Convention"); The Pact of the League of Arab States, March 22, 1945, art. 5, 70 U.N.T.S. 237; Charter of the Organization of American States, April 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (known generally as the "Protocol of Buenos Aires"); The Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681., T.I.A.S. No. 1838, 121 U.N.T.S. 77 (known generally as the "Rio Pact"); The American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (known generally as the "Pact of Bogota"); and the Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

19. Fourth Geneva Convention, *supra* note 16, at art. 146, 6 U.S.T at 3365.

20. For a comprehensive compilation of authoritative documents pertaining to the Gulf War, see *Current Documents: Gulf War Legal and Diplomatic Documents*, 13 HOUS. J. INT'L L. 281.

21. According to Article 53 of the Vienna Convention, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Even a treaty that might seek to criminalize forms of insurgency protected by this peremptory norm would be invalid. Further, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The concept is extended to newly emerging peremptory norms by Article 64 of the Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention on the Law of Treaties, May 22, 1969, art. 53, U.N. Conference on the Law of Treaties, First and Second Sessions, Mar. 26-May 24, 1968, and Apr. 9-May 22, 1969, U.N. Doc. A/CONF. 39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679 (1969).

Time is running out! Saddam Hussein and the surviving members of his Revolutionary Council, by evading prosecution, would defile justice and leave international law weak and tragically undermined, whatever the military outcome.

Significantly, the Security Council issued its resolutions *before* the most serious Iraqi crimes were uncovered. What does this imply? Our current system of international law[22] establishes, beyond any reasonable doubt, the primacy of justice and human rights in world affairs. The words used so carefully at Nuremberg, "so far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished,"[23] derive from the very ancient principle: *nullum crimen sine poena*. This principle applies with particular clarity and urgency to the crimes of Saddam Hussein and his henchmen.

It is arguable, of course, that the formal protocol of a trial would prove manifestly unjust applied to such *overwhelming* lawlessness. The concept here is that prosecution of Iraqi crimes under international law would result in a mockery of civilized law-enforcement, not because of perceived abuses of power and legal procedure but because such judicial "remedy" could create an erroneous appearance of proportionality. This argument, which holds that for certain egregious crimes, no amount of punishment can produce justice, leads to two diametrically opposite courses of action: (1) extra-judicial punishment (normally execution), or (2) leaving the crimes unpunished altogether. The first course of action is unsatisfactory. It contains all of the elements of infinite regress. When, if ever, is the amount of extra-judicial punishment finally commensurate with the crime? There are also tactical difficulties involved in killing an "adequate" number of perpetrators. Moreover, this option is plagued by an inadequacy concerning the identification of the wrongdoers, probable cause and the standard of beyond a reasonable doubt.[24] The second

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22. International law, of course, is *part of* U.S. law. Recalling the words used by the U.S. Supreme Court in *The Paquete Habana*, the principal case concerning the incorporation of international law into this country's municipal law

> [I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677, 700 (1900).

23. Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgement of the Tribunal, U.N. Doc. A/8771.

24. The "beyond reasonable doubt" standard, that has characterized the Anglo-American criminal justice system for more than two hundred years, is a component of the broader question of the theory of evidence. Evidentiary doctrines are associated with arrest, pretrial examination, and grand jury indictment. Historically, the study of reasonable doubt has been linked to the work of juries. English law was affected by John Locke who presented an ordered account of levels of probability. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690). Locke's criteria for evaluating testimony emphasized the number of wit-

course of action is unsatisfactory because it represents flagrant disregard for expectations of *nullum crimen sine poena.*

The Nuremberg obligations to bring major Iraqi criminals to trial are doubly binding to the U.S. as these obligations represent not only current obligations under international law,[25] but also the higher obligations found in the American political tradition.[26] By their codification of the

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nesses, their integrity, their skill at presenting evidence and its agreement with the circumstances and the presence or absence of contrary testimony. Samuel Pufendorf links the concept of "conscience" to notions of moral certainty and beyond reasonable doubt. For Pufendorf, the "satisfied conscience" of a jury required rational, unbiased and unemotional acts of the understanding. SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (C. H. Oldfather & W. A. Oldfather trans., 1688). Regarding the concept of "probable cause," it is now the prevailing grand jury evidentiary standard. In the United States, probable cause has usually not been used as a standard to determine the guilt or innocence of accused defendants, but rather to determine whether or not sufficient evidence has been produced to indicate that a crime has been committed by the accused. BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 103 (1991). The concept has also been important in the context of arrest and search standards. This is quite different from our concern with extra-judicial punishment. One partial "remedy" in assassination decisions would be to replace the standard of probable cause with the stricter *prima facia* case standard. For the origins of this standard, see THOMAS STARKIE, 1 PRACTICAL TREATISE OF THE LAW OF EVIDENCE 554 (10th ed., 1876). A coherent and purposeful elucidation of the *prima facie* evidence standard was offered by Chief Justice Shaw's 1832 charge to a Massachusetts grand jury that *prima facie* evidence of guilt ". . . be of such a nature, that if it stood alone, uncontradicted and uncontrolled by any defensive matter, it would be sufficient to justify a conviction on trial." SHAPIRO, at 95. As evidentiary standards, *prima facie* and probable cause suggest different degrees of probability, with probable cause as a less demanding standard. Significantly, there is an important connection between the prima facie case standard and legally admissible/competent evidence, i.e., what grand juries would consider trial-admissible evidence. An advantage of a prima facie case standard in deciding upon extra-judicial punishment is that it demands decisional authorities not to inflict harm on an accused unless it can fairly predict that the accused would be found guilty by a jury. Needless to say, this advantage is complicated and undermined by the fact that (a) fair prediction is an exceedingly complicated calculation; and (b) the jury in question would have been convened in the municipal context of the assassinating state's court. All of this is complicated further by the designated victim's incapacity to confront his accusers, what would certainly seem to be in basic violation of elementary "due process" standards. Moreover, it may be especially difficult to apply probability calculations in extrajudicial settings, i.e., more difficult than in constituted legal arenas.

25. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal (1946) was followed by Resolution 177, adopted November 21, 1947, directing the U.N. International Law Commission to "(a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and (b) prepare a draft code of offenses against the peace and security of mankind. . . ." H.R.J. Res. 177, 80th Cong., 1st Sess. (1947), U.N. Doc. A/519, at 112. For the principles formulated, see RICHARD A. FALK, *supra* note 1, at 107-108.

26. The principle of a higher law is one of the enduring and canonic principles in the history of the United States. Codified in both the Declaration of Independence and in the Constitution, it rests upon the acceptance of certain notions of right and justice that obtain because of their own obvious merit. Such notions, as the celebrated Blackstone declared, are nothing less than "the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover so far as they are necessary for the conduct of human actions." When Jefferson set to work to

principle that basic human rights, in war and in peace, are now peremptory, the Nuremberg obligations reflect perfect convergence of international law and the enduring foundation of our American Republic.[27]

Worldwide lack of concern for legal protection of human rights grew out of the post-Westphalian system of world politics. This system sanctifies untrammeled competition between sovereign States and identifies national loyalty as the overriding human obligation. With these developments, unfettered nationalism and State-centrism have become dominant characteristics of international relations. The resultant world order has come to subordinate all moral and ethical sensibilities to the idea of unlimited sovereignty. Such subordination was more than a little ironic. Even Jean Bodin, who advanced the idea of sovereignty as free of any external control or internal division, recognized the limits imposed by divine law and natural law.

It is equally ironic that former President Bush, reacting to the news of post-war Iraqi crimes against the Kurds and other minorities,[28] spoke of Iraqi "sovereignty" in ways that placed such crimes within the ambit of domestic jurisdiction. All such crimes become matters of international concern because of their international impact and the outrage they invoke

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draft the Declaration he drew freely upon Aristotle, Cicero, Grotius, Vattel, Pufendorf, Burlamaqui, and Locke's *Second Treatise of Government*. Asserting the right of revolution whenever government becomes destructive of "certain unalienable rights," the Declaration of Independence posits a natural order in the world whose laws are external to all human will and which are discoverable through human reason. Although, by the eighteenth century, God had withdrawn from immediate contact with humankind and had been transformed into Final Cause or Prime Mover of the universe, "nature" provided an appropriate substitute. Reflecting the decisive influence of Isaac Newton, whose *Principia* was first published in 1686, all of creation could now be taken as an expression of divine will. Hence, the only way to know God's will was to discover the law of nature; Locke and Jefferson had defied nature and denatured God.

27. Regarding this foundation, prosecution of war crimes took place during the American Revolution, after the Spanish-American War and after the occupation of the Philippines. After the Civil War, a landmark case was the trial of Confederate Major Henry Wirz for his role in the death of several thousand Union prisoners in the Andersonville prison. For discussions of these cases, including the Revolutionary War trial of Captain Nathan Hale by a British military court and Major John Andre by a board of officers appointed by George Washington. *See* Bassiouni, *supra* note 4, at 206-207. *See also* 8 AMERICAN STATE TRIALS 657 (J. Lawson ed., 1917).

28. To a considerable extent, these crimes were made possible by U.S. betrayal. Throughout the war, U.S. forces played an active role in encouraging Iraqi revolt against Saddam Hussein's rule. Yet, when Iraqi Shiites and Kurds heeded this encouragement, they were left to their own devices; i.e., they were slaughtered with impunity. "The Iraqi people alone have the responsibility and the right to choose their own government—without outside interference," declared a Voice of America editorial on March 7, 1991, when Shiite forces controlled almost all of southern Iraq. Bush administration policy, recalled Peter Galbraith, a Senate Foreign Relations Committee staffer who visited Iraq in March, 1991, was essentially as follows: "We're not going to get involved in Iraq's internal affairs." This was, said Galbraith, "a clear signal to Saddam that he could kill whomever he needed to stay in power." Tony Horwitz, *After Heeding Calls To Turn On Saddam, Shiites Feel Betrayed*, WALL ST. J., Dec. 26, 1991, at A1.

in the conscience of humankind. International law now concedes that limitations on the authoritative competence of each state are imposed not only by the requirements of international comity, but also by the *inherent* rights of each individual person to claims of life and dignity.[29]

International law does not sanctify sovereignty at all costs. Recognizing the peremptory character of a human rights regime, it has now transported a broad range of state-inflicted harms from the realm of domestic jurisdiction to one of international concern.[30] Indeed, in the post-Nuremberg world order, international law has substantially enlarged the right of particular states to intervene within the territory of other states, on behalf of essential human rights.

The Charter of the United Nations, a multilateral, law-making treaty, stipulates in its Preamble and several of its articles that international law protects human rights. In the Preamble, the peoples of the United Nations reaffirm their faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and their determination "to promote social progress and better standards of life in larger freedom."[31]

These codified expressions of the international law of human rights,

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29. These requirements of comity are normally associated with Emmerich de Vattel's notion of "mutual aid." According to The Law of Nations, "[s]ince Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require." 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW xii (Charles G. Fenwick, trans., 1758). The core of Vattel's argument for comity is as follows:

> The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all Nations is likewise that of mutual assistance in order to perfect themselves and their condition. The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations.

Id.

30. These harms include crimes against the environment. For an exhaustive and authoritative assessment of Iraqi crimes against the environment and their consequences, see ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, AMERICAN LAW DIVISION, 102D CONG., 2D SESS., *The Environmental Aftermath of the Gulf War* (Comm. Print 1992). The principal concerns of the Senate Gulf Pollution Task Force were: (1) the need to extinguish the oil well fires as quickly as possible; (2) to examine potential health impacts on U.S. troops and citizens of the region; (3) to examine the potential global and regional environmental impact; and (4) to review the applicable principles of international law which governed Iraq's actions. Regarding the fourth concern, Iraqi crimes against the environment and international law, the Task Force, *inter alia*, reaffirmed the fundamental principle of responsibility for transnational harm. This principle is grounded in the expression of customary international law that "a State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighboring State." *Id.*

31. U.N. CHARTER preamble.

make abundantly clear that individual States can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens. Notwithstanding Article 2 (7) of the UN Charter, which reaffirms certain areas of domestic jurisdiction, each State is obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions does not confer immunity from responsibility, since all States remain bound by the law of the Charter and by the customs and general principles of law from which such agreements derive.

The international regime on human rights also establishes the continuing validity of natural law as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg.[32] While the Nuremberg Tribunal cast its indictments in terms of existing positive law, law enacted by States, the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its explicit and detailed codification.

Ironically, however, in the most recent case of egregious human rights violation within a state, the genocide-like crimes committed by Saddam Hussein against the Kurdish populations in Iraq, the legal community of humankind stopped short of authentic humanitarian intervention. The fact that such intervention would have taken place in the aftermath of a UN sanctioned war of collective security and collective self-defense against the regime in Baghdad compounds the irony of this failure. Indeed, the allies justified the war against Saddam on behalf of, *inter alia*, the violation of human rights in Kuwait during the Iraqi occupation.

Why the contradiction? Why does such a glaring gap exist between the settled tenets of international law and actual state practice? The answer lies in geopolitics. Fearing a power vacuum in the region and the alienation of U.S. allies, the Bush administration did not comply, in any serious sense, with the Iraqi opposition.[33] The U.S. viewed the Iraqi Shi'a opposing Saddam as pawns of Iran seeking to impose a Khomeini-style regime, in spite of a very different history. The Iraqi Kurds were believed

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32. *See* International Conference on Military Trials, Report of Robert H. Jackson, Department of State, *in* BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION 368-369 (1975). The judgment of the International Military Tribunal of October 1, 1946 rested upon the four Allied Powers' London Agreement of August 8, 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement.

33. In earlier cases, the unwillingness of the United States to support codified and well-established anti-genocide norms derived from its obsessive commitment to anti-Sovietism. Indeed, at the end of World War II, America shielded large numbers of Nazi war criminals from prosecution, preferring to enlist their services as spies against East Germany and the Soviet Union. At a time when the U.S. was involved as the principal architect of the International Military Tribunal at Nuremberg, a secret military program—known aptly as "Ratline"—used Nazi war criminals as highly-paid intelligence agents against the East. All of this took place when tens of thousands of concentration camp survivors were denied admittance to the United States. *See* ABRAM L. SACHAR, THE REDEMPTION OF THE UNWANTED 129 (1983); and Ralph Blumenthal, *Nazi Whitewash in 1940's Charged*, N.Y. TIMES, Mar. 11, 1985, at 1.

to be seeking the complete breakup of Iraq and the creation of an independent Kurdistan, an objective judged to be fundamentally dangerous to our ally Turkey.

The failure of humanitarian intervention on behalf of Iraq's Kurds dates back further than the end of the recent Gulf War. During the 1980's, this beleaguered population began a rebellion that was crushed with extraordinary ferocity. Beginning in 1985, Saddam's regime engaged in a systematic program of destruction of all of the villages of Kurdistan.

In March 1988, the regime used poison gas on the city of Halabja. Later, Saddam launched a broad chemical attack on more than 70 villages along the Iraqi-Turkish and Iraqi-Iranian borders. According to an authoritative report offered by the Committee on Foreign Relations, United States Senate: with that rebellion taking the lives of more than 100,000 Kurds and costing another two million of their homes, the Kurdish leadership was reluctant to proceed without an assurance of success.[34]

Let us return to the matter of criminal prosecution. *Where* should the trials be held?[35] Nuremberg had been expected to be the precursor for the establishment of a permanent international criminal court for the prosecution of international crimes. Yet, even today, no such court has been created. Contrary to commonly held misconceptions, the International Court of Justice at the Hague has absolutely no penal or criminal jurisdiction, and is therefore unsuitable for the task at hand.[36]

One obvious jurisdictional solution, would be to parallel Nuremberg and establish a specially-constituted *ad hoc* Nuremberg-style tribunal

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34. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102d CONG., 1ST SESS., Civil War in Iraq 2 (Comm. Print 1991).

35. After the Second World War, three judicial solutions were adapted to the problem of determining the proper jurisdiction for trying Nazi offenses by the victim States, solutions that were additional to the specially-constituted Nuremberg Tribunal. The first solution involved the creation of special courts set up expressly for the purpose at hand. This solution was adopted in Rumania, Czechoslovakia, Holland, Austria, Bulgaria, Hungary and Poland. The second solution, adopted in Great Britain, Australia, Canada, Greece and Italy, involved the establishment of special military courts. The third solution brought the Nazis and their collaborators before ordinary courts—a solution accepted in Norway, Denmark and Yugoslavia. This solution was also adopted by Israel, although—strictly speaking—the State of Israel did not exist at the time of the commission of the crimes in question.

36. The International Court of Justice does, however, have jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions. Such jurisdiction is accorded by the Genocide Convention, Dec. 9, 1948, art. 9, 78 U.N.T.S. 277; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1056, art. 10, 266 U.N.T.S. 3; the Convention on the Political Rights of Women, Mar. 31, 1953, art. 9, 193 U.N.T.S. 135; the Convention Relating to the Status of Refugees, July 28, 1951, art. 38, 189 U.N.T.S. 150; and the Convention on the Reduction of Statelessness, Dec. 4, 1954, art. 14, A/Conf. 9/15, 1961, annex. In exercising its jurisdiction, however, the ICJ must still confront significant difficulties in bringing recalcitrant States into contentious proceedings. There is still no way to effectively ensure the attendance of defendant States before the Court. Although many States have acceded to the Optional Clause of the Statute of the ICJ, these accessions are watered down by many attached reservations.

within the defeated country's territory, (probably in Baghdad).[37] Another acceptable, and far more likely possibility would be to undertake such proceedings within the country that had been Iraq's principal victim, Kuwait. The court could display broad coalition representation, if within Iraq, or, depending upon the desired range of indictments, be fully Kuwaiti in representation. The Convention on the Prevention and Punishment of the Crime of Genocide,[38] among other sources, would provide legal precedent and justification for these possibilities. Article VI of this Convention provides that trials for its violation be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."[39]

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37. Such a tribunal could be established under articles 22 and 29 of the United Nations Charter, authorizing creation of subsidiary organs. *See* Luis Kutner & Ved P. Nanda, *Draft Indictment of Saddam Hussein*, 20 DENV. J. INT'L L. & POL'Y 91 (1991) (a very useful draft indictment of Iraqi President Saddam Hussein, his political, military and economic advisors, and of other unnamed defendants).

38. This does not mean, however, that the creation of appropriate tribunals would be contingent upon Iraqi crimes being authentic instances of genocide as defined at the Convention. Rather, such creation would still be consistent with related "genocide-like" crimes — crimes that may derive from multiple other sources of international law. See *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 606 U.N.T.S. 267 (entered into force, April 22, 1954); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135, (entered into force, July 7, 1976); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Dec. 14, 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of all forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966) (entered into force, Jan. 4, 1969); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967) (entered into force, Jan. 3, 1976); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) (entered into force, Mar. 23, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970) (entered into force, July 18, 1978); The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), the Optional Protocol to the International Covenant on Civil and Political Unrest, and the International Covenant on Economic, Social and Cultural Rights, known collectively as the International Bill of Human Rights, serve as the touchstone for the normative protection of human rights.

39. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The Genocide Convention was submitted to the Senate by President Harry S. Truman in June, 1949. On February 19, 1986, the Senate consented to ratification with the reservation that legislation be passed that conforms U.S. law to the precise terms of the Treaty. This enabling legislation was approved by Congress in October 1988, and signed by President Reagan on November 4, 1988. This legislation amends the U.S. Criminal Code to make genocide a Federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. The Genocide Convention proscribes conduct that is juristically distinct from other forms of prohibited wartime killing (i.e., killing involving acts constituting crimes of war and crimes against humanity). Although crimes against humanity are linked to war-

Washington and its allies must also decide on how broadly they wish to prosecute Iraqi crimes. In this respect, the special post World War II war crimes planning group had a somewhat easier task, focussing primarily on particular Nazi groups defined as inherently criminal. Following the recent defeat of Saddam Hussein, however, many of the crimes against humanity committed by Iraq appeared unplanned and individually conceived. Consequently, coalition lists of suspected war criminals could become so large as to prove altogether unusable. Alternatively, coalition prosecution could focus essentially or even entirely on Saddam and his leadership elite. This judicial strategy would permit many or all rank-and-file Iraqi criminals to avoid punishment, but would at least stand some chance of far-reaching and practical success.

Regarding breadth of prosecutorial concern, the United States and its partners must also decide whether or not to include Iraq's crimes against its own Kurdish populations. During 1987 and 1988, Baghdad undertook a campaign of destruction of Kurdish villages, and the relocation of large numbers of Kurds to selected areas of Iraq. In 1988, after the Iran-Iraq war ended, the Iraqi air force launched massive chemical attacks on Kurdish villages.

After the recent Gulf War, Iraq's Kurds were once again the targets of genocidal assaults by Saddam Hussein's regime. In northern and southern Iraq, forces loyal to Saddam Hussein shelled Kurdish cities intensely, leveled entire neighborhoods and engaged in wholesale massacres of Kurdish civilians. According to a report issued by the Committee on Foreign Relations, United States Senate: "more than two million Iraqi Kurds have sought refuge on the Iraq-Turkey and the Iraq-Iran borders and they are dying at a rate of up to 2,000 a day."[40] In the words of Peter W. Galbraith, author of the report:

> My visit to liberated Kurdistan, over the weekend of March 30—31, coincided with the collapse of the Kurdish rebellion and the beginning of the humanitarian catastrophe now overwhelming the Kurdish people. I was an eyewitness to many of the atrocities being committed by the Iraqi army, including the heavy shelling of cities, the use of phosphorous artillery shells, and the creation of tens of thousands of refugees. From Kurdish leaders and refugees I heard firsthand accounts of other horrors including mass executions and the levelling of large sections of Kurdish cities.[41]

These crimes continue well up to the present. At the time of this writing, Iraq continues to launch large ground and air attacks against Kurdish towns in northern Iraq. An unofficial cease-fire has remained in

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time actions, the crime of genocide can be committed in peacetime or during a war. According to Article I of the Genocide Convention: "The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Id.*

40. *Supra* note 34, at vi.

41. *Supra* note 34, at v.

effect. The entire pattern of Iraqi crimes against the Kurds goes beyond domestic jurisdiction, and must be recognized as a matter of international concern.

Finally, it should be noted that a coalition agency charged with creating "another Nuremberg" could adopt the solution favored by the United States, the Soviet Union, Great Britain and France in 1945. The coalition would establish a specially created tribunal for the trial of major criminals while the domestic courts of individual coalition countries would provide the venue for trials of "minor" criminals. As in the prosecution of Nazi offenses, the separation of *major* and *minor* criminals concerns matters of rank or position, and would have nothing to do with the seriousness or horror of particular transgressions.

From a strictly jurisprudential point of view, crimes of war, crimes against peace and crimes against humanity are offenses against humankind over which there is universal jurisdiction and a universal obligation to prosecute.[42] However, the United States should now take the lead in prosecution of major Iraqi criminals for many complementary reasons. These reasons include the special U.S. role in military operations supporting the pertinent Security Council resolutions, the historic U.S. role at Nuremberg in 1945 and the long history of U.S. acceptance of jurisdictional competence and responsibility on behalf of international law.[43]

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42. The principle of universal jurisdiction is founded upon the presumption of solidarity between states in the fight against crime. *See generally* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Francis W. Kilsey trans., 1925), and EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE 93 (1916). The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. *Cf.* Art. 49 of Convention No. 1; Art. 50 of Convention No. 2; Art. 129 of Convention No. 3; and Art. 146 of Convention No. 4. For further support of universality for certain international crimes see M.C. BASSIOUNI, 2 INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (1987). *See also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402-404 and 443 (Tentative Draft No. 5, 1984); 18 U.S.C. § 3 (1992).

43. In addition to the territorial principle and the nationality principle, there are three other traditionally recognized bases of jurisdiction under international law: the protective principle, determining jurisdiction by reference to the national interest injured by the offense; the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and the passive personality principle, determining jurisdiction by reference to the nationality of the person injured by the offense. The Genocide Convention itself, however, does not stipulate universal jurisdiction. A recent example supporting the principle of universal jurisdiction in matters concerning genocide involves action by the United States. A Ruling for the extradition to Israel of accused Nazi war criminal John Demjanjuk, by the U.S. Court of Appeals in 1985, recognized the applicability of universal jurisdiction for genocide, even though the crimes charged were committed against persons who were not citizens of Israel and the State of Israel did not exist at the time the heinous crimes were committed. In the words of the court:

> "[w]hen proceeding on that jurisdictional premise neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of na-

As noted by the Sixth Circuit in *Demjanjuk v. Petrovsky*, "[t]he law of the United States includes international law" and "international law recognizes 'universal jurisdiction' over certain offenses."[44] Article VI of the Constitution, and a number of court decisions make all international law, conventional and customary, the supreme law of the land. The Nuremberg Tribunal acknowledged that the participating powers "have done together what any one of them might have done singly."[45]

In exercising its special responsibilities under international and municipal law concerning prosecution of egregious Iraqi crimes, the United States already has the competence to prosecute in its own federal district courts.[46] Pertinent authority for such jurisdiction can be found in sections 818 and 821 of Title 10 of the United States Code, which form part of an

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> tions or against humanity, and that the prosecuting nation is acting for all nations.

Demjanjuk v. Petrovsky, 776 F.2d. 571 (6th Cir. 1985).

44. *Id.* at 582-83. In all aspects of recent Iraqi crimes, jurisdiction to prosecute is unambiguously universal. Traditionally, piracy and slave trading were the only offenses warranting universal jurisdiction. Following World War II, however, states have generally recognized an expansion of universal jurisdiction to include: crimes of war; crimes against peace; crimes against humanity; hostage taking; crimes against internationally protected persons; hijacking; sabotage of aircraft; torture; genocide; and apartheid. For the most part, this jurisdictional expansion has its origins in multilateral conventions, customary international law and certain pertinent judicial decisions. The Second Circuit's statement in *Filartiga v. Peña-Irala* declares: "[t]he torturer has become, like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind." Filartiga v. Peña-Irala, 630 F.2d 890 (2d Cir. 1980). The federal district court in *United States v. Layton* recognized that "nations have begun to extend universal jurisdiction to. . .crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy." United States v. Layton, 509 F. Supp. 212, 223 (N.D. Calif. 1981). For other judicial examples of assertions of universal jurisdiction, see United States v. Yunis, 681 F. Supp. 909 (D.C. 1988); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); and Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.C. 1985).

45. Apart from the prosecution of Nazi war criminals, there have been only two trials under the Genocide Convention by competent tribunals of the States wherein the crimes were committed: (1) in Equatorial Guinea, the tyrant Macis had been slaughtering his subjects and pillaging his country for a number of years. He was ultimately overthrown, found guilty of a number of crimes, including genocide, and executed. (In a report on the trial, however, the legal officer of the International Commission of Jurists concluded that Macis had been wrongfully convicted of genocide); and (2) in Kampuchea, when the Khmer Rouge were overthrown by the Vietnamese, the successor government instituted criminal proceedings against the former Prime Minister, Pol Pot, and the Deputy Prime Minister on charges of genocide, and the accused were found guilty of the crime, in absentia, by a people's revolutionary tribunal.

46. Since its founding, the United States has reserved the right to enforce international law within its own courts. The American Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. 1, § 8, cl. 10. Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute. This statute authorized United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. At that time the particular target of this legislation was piracy on the high seas.

extraterritorial statutory scheme and 18 U.S.C. § 3231. It follows from all this that international and U.S. law have already established the legal machinery for bringing Saddam Hussein and his fellow criminals to justice. The only missing element is the political will to make this machinery work.

However, we need to be realistic. Before international law can actually "work" in this matter, its agents will have to acquire *custody* of Saddam Hussein et. al. Ideally, the coalition could obtain custody via the long-established mechanisms of extradition[47] or prosecution, and the associated means of "indirect enforcement" (i.e., prosecution within authoritative municipal courts in the absence of a permanently constituted international criminal court or an *ad hoc* tribunal). But other possibilities must be considered, as these prospects remain extremely remote.

One such possibility would involve the reinsertion of coalition military forces into Iraq. Although the essential rationale of such return would ensure Iraqi compliance with authoritative cease-fire expectations, especially as they concern Baghdad's mandated elimination of weapons of mass destruction, a reinserted multinational military force could also be used to identify and apprehend alleged Iraqi criminals. Though entirely proper from a jurisprudential perspective, reintroduction of appropriate military forces for the sole purposes of such identification and apprehension, subject, of course to the limits[48] of *jus in bello* or the laws of war,[49]

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47. At this time, the United States has extradition agreements with over 100 countries. The treaties range in age from an 1856 agreement with the Austrian Empire, which is still in force with respect to one of its successor states (Hungary) to the protocol with Canada, which entered into force in November, 1991. The Office of International Affairs in the Criminal Division of the Department of Justice plays an important role in extradition matters. From OIA's inception in 1979, its attorneys have cooperated with the Department of State in negotiating all new extradition agreements. According to testimony by Robert Mueller, III, Assistant Attorney General, Criminal Division, Department of Justice:

> In general, our goal in extradition negotiations in recent years has been threefold: first, to expand the number of offenses for which extradition can be obtained by including all conduct that is criminal under the laws of both countries and punishable by a specified minimum period of incarceration; second, to limit the exceptions to extradition, particularly the exception for so-called political offenses; and third, to improve the way in which extradition treaties function by simplifying and clarifying provisions that were inadequately addressed in older treaties.

Consular Conventions, Extradition Treaties and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS); Hearings Before the Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)(Statement by Robert S. Mueller, III).

48. *See* 2 SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 139 (Frank Gardner Moore, trans., 1964) (for an early expression of limits under the law of war).

> As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however,

would be unlikely for both tactical and political reasons.

Another possibility would involve custody by forcible abduction.[50]

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commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

Id.

49. The principle of proportionality, of course, has its origins in the biblical *Lex Talionis*, (law of exact retaliation). The "eye for eye, tooth for tooth" expression is found in three separate passages of the Jewish Torah, or biblical Pentateuch. These Torah rules are likely related to the Code of Hammurabi (c. 1728-1686 B.C.)—the first written evidence for penalizing wrongdoing with exact retaliation. In matters concerning personal injury, the code prescribes and eye for an eye (#196), breaking bone for bone (#197), and extracting tooth for tooth (#199). Among the ancient Hebrews, we should speak not of *the lex talionis*, but of several. The *lex talionis* appears in only three passages of the Torah. In their sequence of probable antiquity, they are as follows: *Exodus* 21:22-25; *Deuteronomy* 19:19-21; and *Leviticus* 24:17-21. (All have affinities to other Near Eastern codes.) These three passages address specific concerns: hurting a pregnant woman, perjury, and guarding Yahweh's altar against defilement. *See* MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW AND LITERATURE 59-186 (1990). In contemporary international law, the principle of proportionality can be found in the traditional view that a state offended by another state's use of force, if the offending state refuses to make amends, "is then entitled to take 'proportionate' reprisals." INGRID DETTER DE LUPIS, THE LAW OF WAR 75 (1987). Evidence of the rule of proportionality can also be found in the International Covenant on Civil and Political Rights of 1966, *supra* note 38, at art. 4. Similarly, the American Convention on Human Rights, *supra* note 38, allows at Article 27(1) such derogations in "time of war, public danger or other emergency which threaten the independence of security of a party" on condition of proportionality. In essence, the military principle of proportionality requires that the amount of destruction permitted must be proportionate to the importance of the objective. In contrast, the political principle of proportionality states that "a war cannot be just unless the evil that can reasonably be expected to ensue from the war is less than the evil that can reasonably be expected to ensue if the war is not fought." DOUGLAS P. LACKEY, THE ETHICS OF WAR AND PEACE 40 (1989).

50. Regarding custody by *abduction*, two discrete issues present themselves: (1) seizure of *hostes humani generis* (common enemy of mankind) when custody cannot be obtained via extradition; and (2) seizure of *hostes humani generis* who is a sitting head of state. On the first issue, we may consider that President Reagan, in 1986, authorized procedures for the forcible abduction of suspected terrorists from other states for trial in U.S. courts. John Walcott, Andy Pasztor & David Rogers, *Reagan Ruling to Let CIA Kidnap Terrorists Overseas is Disclosed*, WALL ST. J., Feb. 20, 1987, sec. 1, at 1, col. 6. The statutory authority for President Reagan's posture, however, was contingent upon the terrorist acts being involved with taking U.S. citizens hostage—acts that are subject to the jurisdiction of U.S. courts under the Act on the Prevention and Punishment of the Crime of Hostage-Taking 18 U.S.C. § 1203 (1992). In 1987, in international waters, the F.B.I. lured a Lebanese national named Fawaz Younis onto a yacht and transported him by force to the U.S. for trial. His abduction was based upon his suspected involvement in a 1985 hijacking of a Jordanian airliner at Beirut airport in which U.S. nationals had been held hostage. G. Gregory Schuetz, *Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L. J. 499, 501 (1988). On the second issue, we may recall that under international law, there is normally a very substantial difference between abduction of a terrorist or other *hostes humani generis* and abduction of *any* head of state. Indeed, there is almost always a presumption of sovereign immunity, a binding rule that exempts each state and its high officials from the judicial jurisdiction of another state. Although the rule of sovereign immunity is certainly not absolute in the post-Nuremberg world order, the right of one state to seize a high official from another state is exceedingly

Under international law, there normally exists a very substantial difference between abduction of an ordinary criminal or even an *hostes humani generis*, common enemy of mankind, and abduction of a sitting head of state. Indeed, a presumption of sovereign immunity, a rule that exempts each state and its high officials from the judicial jurisdiction of another state or transnational authority, persists.[51]

What if neither of these possibilities prove practical? Here international law may have to content itself with conducting trials *in absentia*. According to the Charter of the International Military Tribunal, Annexed to the London Agreement of August 8, 1945:

> the Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter (crimes of war; crimes against peace and crimes against humanity) in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.[52]

Yet, trials in absentia would not be without serious difficulties.[53] Apart from their intrinsic shortcomings, such trials may still run counter to long-settled principles of justice and due process in national and international law. In the UN Report of the 1953 Committee on International

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limited. In an 1812 case before the Supreme Court of the United States, The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812), Chief Justice Marshall went even further, arguing for "the exemption of the person of the sovereign from arrest or detention within a foreign territory." Nevertheless, where the alleged crimes in question are of a Nuremberg-category and no other means exist whereby to gain custody of the pertinent head of state, the expectations of *nullum crimen sine poena* (no crime without punishment) may override those of sovereign immunity. In the United States, the terms of the Posse Comitatus Act, 18 U.S.C. § 1385 (1992), prohibit the U.S. military from undertaking domestic law enforcement. However, this prohibition does not apply outside the United States. *See* John Quigley, *Enforcement of Human Rights in U.S. Courts: The Trial of Persons Kidnapped Abroad, in* WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 59-80 (Mark Gibney ed., 1991). It would appear, therefore, that the United States *has* authority under its own and international law to gain custody of Saddam Hussein, et. al., by forcible abduction if necessary. This argument is all the more compelling in view of U.S. seizure of General Manuel Noriega, whom Washington regarded as a head of state, from Panama in 1990. Noriega, it should be recalled, had been charged with violations of U.S. drug trafficking laws, norms substantially less serious than those revolving around Nuremberg-category crimes.

51. Historically, the rule of sovereign immunity may be traced to Roman Law and to the maxim of English Law that the King can do no wrong. Under current United States law, the authoritative expression of this rule may be found in the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1602 (1992).

52. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

53. Regarding *in absentia* trials, Professor D'Amato, responding to a question by Senator Charles S. Robb at the Hearing on The Persian Gulf and The Question of War Crimes, argued that "there is more psychological impact in having a standing indictment against [Saddam Hussein], hanging over his head, maybe not a 'Sword of Damocles,' but a 'Sword of Justice.'" *See* D'Amato, *supra* note 10, at 19.

Criminal Jurisdiction, the Committee reaffirmed the general principle of law that an accused "should have the right to be present at all stages of the proceedings."[54] In the Annex to this Report, in the Committee's Revised Draft Statute for an International Criminal Court, the rights of the accused to a "fair trial" include, *inter alia*, "the right to be present at all stages of the proceedings."[55]

The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, also stipulates that everyone charged with a criminal offense has the right, "to defend himself in person or through legal assistance of his own choosing. . . ."[56] The International Covenant on Civil and Political Rights, which entered into force in 1976 affirms this right.[57]

Strictly speaking, however, when a tribunal charges someone with a criminal offense and offers them representation through legal assistance of his own choosing, as an alternative to defending himself in person, this opportunity satisfies essential minimum guarantees under law and does not deprive the individual of due process. Similarly, anyone who is charged with a criminal offense and offered but declines the opportunity to defend himself in person, is normally not being mistreated under law.

Finally, though distasteful, assassination may be considered as a very last resort in the matter of Saddam Hussein et. al. Notwithstanding the normal prohibitions of assassination under international law, especially as they pertain to a head of state, circumstances exist wherein the expectations of the anti-genocide regime must override the ordinary prohibitions.[58] After all, if the assassination of a Hitler or a Pol Pot could have saved millions of innocent people from torture and murder, wouldn't justice have required its application?

From the point of view of international law, assassination as a remedy for Iraqi genocide and genocide-like crimes would be least problematic if it originated within Iraq. Such action would qualify under the right of tyrannicide. Aristotle, Plutarch and Cicero offer traditional and authoritative support for such a form of assassination. According to Cicero:

> [T]here can be no such thing as fellowship with tyrants, nothing but bitter feud is possible: and it is not repugnant to nature to despoil, if you can, those whom it is a virtue to kill; nay, this pestilent and godless brood should be utterly banished from human society. For as we

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54. *Report of the Committee on International Criminal Jurisdiction*, Aug. 20, 1953, U.N. GAOR, 9th Sess., Supp. No. 12, at 21, U.N. Doc. A/2645 (1954).

55. Revised Draft Statute for an International Criminal Court, Annex to the Report of the Committee on International Criminal Jurisdiction, *Id.*

56. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

57. International Covenant on Civil and Political Rights, *supra* note 38.

58. Under United States law, "[p]rohibition on Assassination. No person employed by, or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 50 U.S.C. § 401 (1993).

> amputate a limb in which the blood and the vital spirit have ceased to circulate because it injures the rest of the body, so monsters, who under human guise, conceal the cruelty and ferocity of a wild beast, should be severed from the common body of humanity."[59]

What if the assassination remedy originated *outside* Iraq? Could such action be construed as an example of law-enforcement, or would it necessarily be criminal behavior? The answer to this question depends, *inter alia*, upon the presence or absence of a condition of war between the states involved. When a condition of war exists between states, international law normally views transnational assassination as a war crime. According to Article 23(b) of the regulations annexed to Hague Convention IV of October 18, 1907, respecting the laws and customs of war on land, "it is especially forbidden. . .to kill or wound treacherously, individuals belonging to the hostile nation or army."[60] U.S. Army Field Manual 27-10, THE LAW OF LAND WARFARE (1956), has incorporated the Hague prohibition, in Paragraph 31: "this article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy dead or alive."[61] Whether or not a particular state has followed a comparable form of incorporation, it is bound by the Hague regulations entered into customary international law as of 1939, according to the 1945 Nuremburg tribunal.

However, a contrary argument exists. Some maintain that the law should consider enemy officials, operating within the military chain of command, as combatants and *not* enemies *hors de combat!* This reasoning, widely accepted with reference to the assassination of Saddam Hussein during the 1991 Gulf War, views certain enemy officials as lawful targets, and assassination of enemy leaders as permissible. This contrary

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59. Elsewhere, Cicero, citing approvingly to the Greeks, offers further support for tyrannicide:

> Grecian nations give the honors of the gods to those men who have slain tyrants. What have I not seen at Athens? What in the other cities of Greece? What divine honors have I not seen paid to such men? What odes, what songs have I not heard in their praise? They are almost consecrated to immortality in the memories and worship of men. And will you not only abstain from conferring any honors on the savior of so great a people, and the avenger of such enormous wickedness, but will you even allow him to be borne off for punishment? He would confess—I say, if he had done it, he would confess with a high and willing spirit that he had done it for the sake of the general liberty; a thing which would certainly deserve not only to be confessed by him, but even to be boasted of.

This is taken from Cicero's speech in defense of Titus Annius Milo, a speech offered on behalf of an instance of alleged tyrannicide committed by Milo, leader of Lanuvium. Cicero, *The Speech of M. T. Cicero In Defense of Titus Annius Milo, in* SELECT ORATIONS OF M.T. CICERO 208 (C.D. Yonge trans., 1872).

60. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) [hereinafter Laws and Customs of War on Land].

61. U.S. ARMY, THE LAW OF LAND WARFARE 27-10 (1956).

argument, in practice, has simply ignored the position codified at Article 23(b) of Hague Convention IV.

In principle, adherents of the assassination of enemy officials in wartime could offer two possible bases of jurisprudential support: (1) such assassination does not evidence behavior designed "to kill or wound treacherously"[62] as defined at Hague Article 23(b); and/or (2) a "higher" or *jus cogens* obligation allows assassination in particular circumstances that transcends and overrides pertinent treaty prohibitions. To argue the first position would focus primarily on a "linguistic" solution; to argue the second would propose a return to the historic natural law origins of international law.

Where no state of war exists, international law would normally define assassination as the crime of aggression and/or terrorism. Article 1 of the Resolution on the Definition of Aggression defines aggression as: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[63]

In view of the *jus cogens* norm of non-intervention codified in the UN Charter, ordinarily violated by transnational assassination, such killing would generally qualify as aggression. Moreover, assuming that transnational assassination constitutes an example of "armed force," Article 2 of the Definition of Aggression may criminalize such activity as aggression:

> the first use of armed force by a State in contravention of the Charter shall constitute *prima facia* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances.[64]

In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as terrorism. Normally considered a convention on terrorism, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents' particular prohibitions of assassination are also relevant here. After defining 'internationally protected person,' at Article 1, Article 2(a) of the convention identifies as a crime, *inter alia*, "the intentional commission of (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person."[65]

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62. Laws and Customs of War on Land, *supra* note 60.

63. *Resolution on the Definition of Aggression*, Adopted by the U.N. General Assembly, Dec. 14, 1974, G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

64. *Id.*

65. Convention on the Prevention and Punishment of Crimes Against Internationally

The European Convention on the Suppression of Terrorism reinforces the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. Article 1(c) of this Convention considers any "serious offense involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents as one of the constituent crimes of terror violence. Article 1(e) considers "an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons" another constituent terrorist crime.[66]

These arguments notwithstanding, circumstances exist wherein the expectations of the authoritative human rights regime must override the ordinary prohibitions against transnational assassination, both the prohibitions concerning conditions of peace and conditions of war. The most apparent of such circumstances, such as the present case of Saddam Hussein, involve genocide and related crimes against humanity.[67] Al-

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Protected Persons, Dec. 14, 1973, art. 1, 28 U.S.T. 1975, T.I.A.S. No. 8532 (entered into force Feb. 20, 1977).

66. European Convention on the Suppression of Terrorism, art. 1, Jan. 27, 1977, Europ. T.S. 90.

67. The utilitarian view is that human actions should be evaluated in light of their consequences, and that only this consequentialist approach will enable us to deal with complex moral and legal issues in a rational, clear, objective and precise fashion. The principle of utility, which has its origins with Jeremy Bentham, is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question . . .to promote or to oppose that happiness." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation, in* PRINCIPLES OF MORALS AND LEGISLATION 125 (W. Harrison ed., 1979). A good utility-based argument against those who claim that assassination is impermissible because it arouses antipathy is Bentham's statement against the principle of sympathy and antipathy which

> approves or disapproves of certain actions, not on account of their tending to augment the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground.

Id. at 138-139. Also, says Bentham:

> If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.

1 JEREMY BENTHAM, PRINCIPLES OF PENAL LAW: THE WORKS OF JEREMY BENTHAM 396 (J. Bowring ed., 1962). From the utilitarian point of view, only consequences constitute good reason for punishing or abstaining from punishment; desert and justice do not count in their own right. Punishment is an evil which a utilitarian considers morally justified only when it

though the argument promoting assassination must normally rest on the presumption that leaving Saddam alive would assuredly result in additional Nuremberg-category crimes, further destruction of dissident populations within Iraq and/or additional crimes of war, against peace and against humanity, such an argument may also stand solely on the jurisprudential requirement of punishment.[68] In this retributive view,[69] law enforcement rationale for the assassination of Saddam Hussein would lie not only in the preemption of new crimes but also in the literal claims of *nullum crimen sine poena.*

Exactly how ancient is the principle of *nullum crimen sine poena*, "no crime without a punishment"? The earliest statement of *nullum crimen sine poena* can be found in the Code of Hammurabi (c. 1728-1686 B.C.), the Laws of Eshnunna (c. 2000 B.C.), the even-earlier code of Ur-Nammu (c. 2100 B.C.) and, of course, the *lex talionis*, or law of exact retaliation, presented in three separate passages of the Jewish Torah, or biblical Pentateuch.[70] At Nuremberg, the words used by the Court, "so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished," represented a reaffirmation of this principle.[71]

The Hebrews viewed the shedding of blood as an abomination that

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is a means for securing a greater good. Because of the principle of *nullum crimen sine poena*, this is a principle not always accepted by utilitarians. This is the case because there are occasions, from a utilitarian perspective, where punishment is judged inappropriate. Where punishment would have worse consequences than non-punishment, punishment would be unprofitable and declined. According to utilitarian thought, every unprofitable punishment is *ipso facto* morally unjustified. Or as Bentham puts it: "It is cruel to expose even the guilty to useless sufferings." JEREMY BENTHAM, THEORY OF LEGISLATION 345 (R. Hildreth ed,. E. Dumont trans., 1871).

68. The permissibility of assassination here is contingent upon the underlying theory of punishment. Where one holds to a utilitarian view, assassination would not be justified unless it were judged to prevent further harm. A retributive view of punishment, however, could justify assassination even without expected deterrent benefits because injustice should not be allowed with impunity.

69. A classical supporter of "retributive justice" was Immanuel Kant. Writing in *Philosophy of Law*, Kant identifies the mode and measure of punishment as follows: "[t]his is the right of retaliation (*justalionis*), and properly understood, it is the only principle which in regulating a public court. . .can definitely assign both the quality and the quantity of a just penalty." Immanuel Kant, *Public Right, in Philosophy of Law* (Hastie trans., 1887). On the retributive view generally, see M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 91-139 (1978); SIR WALTER MOBERLY, THE ETHICS OF PUNISHMENT 96-120 (1968); C. L. TEN, CRIME, GUILT, AND PUNISHMENT 38-65 (1987); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-97 (1981); JOHN KLEINIG, PUNISHMENT AND DESERT (1973); D. J. GALLIGAN, *The Return to Retribution in Penal Theory, in* CRIME, PROOF AND PUNISHMENT 154-157 (C. Tapper ed., 1981); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 67-110 (1989); TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 22-51 (1969); A TEXTBOOK OF JURISPRUDENCE 320-326 (G. Paton and Durham eds., 1964); HEINRICH OPPENHEIMER, THE RATIONALE OF PUNISHMENT (1975); MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 21-33 (1981). For a broader but fascinating treatment, see also HENBERG, *supra* note 49.

70. *See supra* note 49.

71. For the court statement, see A. P. D'ENTREVES, NATURAL LAW 110 (1964).

required expiation, "for blood pollutes the land, and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it."[72] This ancient Hebrew belief in "pollution" parallels that of the ancient Greeks. In the words of Marvin Henberg: "The (Greek) Erinyes do for the Greeks of the seventh to fourth centuries B.C.E. what Yahweh does for the ancient Hebrews, they demand the blood of homicides."[73] The pre-Socratic philosophers, especially Anaximander, Heraclitus and Parmenides, displayed a metaphysical view of retributive justice as inherent in the cosmos itself.[74] Among the ancient Greeks, homicide pollution extended to those guilty of accidental murder and, left unpunished, even threatened the community at large. According to Marvin Henberg:

> Homicide pollution entails the following: One guilty of murder, deliberate or accidental, contracts a metaphysical stain, invisible save to the Erinyes and to the gods. Like a deadly disease, pollution renders the agent a danger to others, for until the stain is purified or the polluted person exiled the public at large stands threatened. Crops may be blighted (witness *Oedipus Rex*) as incentive for the populace to seek out the murderer. Liability to suffering, then, is collective; and in its nearly allied form of the curse, pollution can be hereditary as well as collective, visiting each generation of a single family with renewed suffering. Finally, the doctrine of pollution imposes strict liability for its offenses. No excuse, justification or mitigation of penalty is allowed: The accidental manslayer must seek purification equally with one who kills out of greed or passion.[75]

Aeschylus gives a good sense of the Greek view of punishment. In *The Libation-Bearers* (310-14) the chorus intones: "the spirit of Right cries out aloud and extracts atonement due: blood stroke for the stroke of blood shall be paid. Who acts, shall endure. So speaks the voice of the age-old wisdom."[76]

Plato included himself among those who recognize the duty of punishment. Thinking of vice, the source of crime, as an ailment of the soul, just as physical disease to the body, he recommends punishment to restore order in the soul. The criminal, therefore, derives a positive benefit

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72. *Numbers* 35:33. For a contemporary expression of the "blood for blood" conception of punishment, see statement of U.S. Senator, now Vice-President, Al Gore on the fourth anniversary of the gassing of the Kurdish city of Halabja. Offered to the U.S. Senate on March 18, 1992, Gore called for establishment of a formal war crimes tribunal to prosecute Saddam Hussein for "cruel, inhuman, unthinkable repression." In justifying such a tribunal, Gore said it would "perform a sacred duty to the dead whose blood, as the Bible says, cries out from the earth on which it was spilled." *Mass Killings in Iraq, Hearings Before the Comm. On Foreign Relations*, 102d Cong., 2d Sess., 51 (1992).

73. *See* HENBERG, *supra* note 49, at 77.

74. WERNER JAEGER, 1 PAIDEIA: THE IDEALS OF GREEK CULTURE 150-169 (Gilbert Highet trans., 1945); Gregory Vlastos, *Solonian Justice, in* 41 CLASSICAL PHILOLOGY 65 (1946); and HUGH LLOYD-JONES, THE JUSTICE OF ZEUS 80-81 (1971).

75. *See* HENBERG, *supra* note 49, at 79.

76. AESCHYLUS, THE LIBATION - BEARERS, 310-314.

from punishment. Discarding the claims of retributivism, Plato views punishment as just and good only to the extent that it serves the common good by advancing human welfare. Punishment should turn others from vice and teach virtue. Aristotle, Cicero, St. Thomas Aquinas, Hobbes, and Bentham have taken similar positions. Says Bentham:

> The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness; in other words, to exclude mischief. . . . But all punishment is mischief; all punishment in itself is evil. Upon the principle utility, if it ought at all to be admitted, it ought to be admitted in as far as it promises to exclude some greater evil.[77]

It follows that utilitarian views of punishment, in contrast to retributivist perspectives, may or may not support the principle of *nullum crimen sine poena*. As to retributivist perspectives, the philosopher Kant remains the classic example of this view of legal punishment, but here retributive justice has nothing to do with revenge. Kantian retribution, an action of *the state* against the criminal, is an impersonal action, undertaken without passion, and as a sacred duty. Kant views legal punishment of criminals as a distinct categorical imperative. In Kant, we see the strongest possible reaffirmation of *nullum crimen sine poena:*

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.[78]

Kant returns to the beginning, to the concept of "blood-guilt," and to the insistence that society has a *duty* to punish even without resulting utilitarian consequences.

At the Nuremberg Trial, which concluded with an explicit reaffirmation of *nullum crimen sine poena*, the Court based its sentencing not on reformation, not deterrence, but on *retribution*. In the words of Sir Walter Moberly, "the principle really embodied at Nuremberg was the principle of retribution. At the time of the trial public opinion in the victorious countries undoubtedly demanded and acclaimed it. Rightly or wrongly, public opinion saw punishment as not only allowable and expedient, but an imperative duty."[79] This instance of retributive justice, undertaken be-

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77. Bentham, *supra* note 66, at 170.

78. Immanuel Kant, *The Metaphysical Element of Justice, in* THE METAPHYSICS OF MORALS. 102 (John Ladd trans., 1965).

79. MOBERLY, *supra* note 68 at 103.

cause the malefactors so clearly *deserved* punishment, also served to ensure that, henceforth, the most abominable perpetrators of international crimes could reasonably expect enforcement of the principle, *nullum crimen sine poena*. This precedent makes the prosecution of Saddam Hussein for Nuremberg-category crimes an indisputable jurisprudential expectation.

President Clinton has no time to lose. Facing a world described prophetically by the poet Yeats, a world wherein "the blood-dimmed tide is loosed, and everywhere/The ceremony of innocence is drowned;/The best lack all conviction, while the worst/Are full of passionate intensity,"[80] the new American leader can choose to stand for naked geopolitics or for justice. Should he choose the latter, as indeed he must, this country would again be aligned with essential principles of dignity and lawfulness. Should he opt for geopolitics, as would happen if he decided against prosecution of Iraqi crimes, we would have no choice but to agree that "there is no longer a virtuous nation, and the best of us live by candle light."[81]

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80. VATTEL, *supra* note 29, at 135. It is instructive to recall Vattel's argument on the observance of justice between nations:

> Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress. . . .[a]n intentional act of injustice is certainly an injury. A Nation has, therefore, the right to punish it. . . . The right to resist injustice is derived from the right of self-protection.

Id.

81. W. B. YEATS, THE LETTERS OF W. B. YEATS 691 (Allan Wade ed., 1954).

INTERNATIONAL CAPITAL MARKETS SECTION

Japanese Banking Reform and the Occupation Legacy: Decompartmentalization, Deregulation, and Decentralization

J. ROBERT BROWN, JR.*

Since the end of the occupation in 1952, Japan has had in place a rigidly compartmentalized banking system. Banks were divided by funding source, by activity, and by geography. City banks, the Japanese equivalent of money center banks, had extensive branch networks and raised a large portion of funds through deposits. They could not, however, sell bonds or otherwise access long term funding.

Long term banks, in contrast, could sell bonds but could not solicit retail deposits. Trust banks, along with insurance companies, managed pension plan assets. Regional banks, particularly those in rural areas, had a monopoly over the prefecture in which they operated. Finally, a rigid separation existed between banks and securities companies.

Compartmentalization had considerable significance. It facilitated government control of the financial system. It also effectively limited the ability of foreign banks to compete. Until the mid-1980s, U.S. banks could not engage in a full range of financial activities within Japan. They could not engage in trust[1] or securities activities,[2] had no right to issue

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1. The Japanese government did issue nine trust licenses to foreign banks following the Yen/Dollar Accord in 1984. The Ministry of Finance, however, made clear that no new licenses would issue until Japanese commercial banks received comparable authority. POLITICAL DECISION: NINE FOREIGN BANKS ALLOWED INTO TRUST BANKING FIELD, THE JAPANESE ECON. JOUR., July 2, 1985, at 1.

bonds and lacked the branch network to access retail deposits.[3]

With an almost manicured appearance, therefore, the banking system resembled a Japanese garden, "rigorously tended and artfully arranged, with each component fixed in place and all parts combining to form an agreeably harmonious role."[4] Although the numbers and relative market share of each category shifted over time, the essential divisions did not. The compartmentalized system of city, long-term, trust and regional banks and securities firms remained intact for 30 years.

In 1992, however, the Diet took a major step toward bringing the Japanese financial system into closer alignment with other industrial countries.[5] Legislation provided the mechanism for ending the compartmentalized financial system by eliminating the distinctions between most classes of financial institutions.[6] The laws enabled banks to engage in securities activities and securities firms to engage in banking activities.[7]

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2. In 1986, the Ministry of Finance allowed foreign banks to engage in securities activities through a separate subsidiary. The bank, however, could not own more than 50% of the subsidiary, resulting in some odd pairings. Morgan Guaranty, for example, owned half of the shares of a securities company with Bechtel owning the other half. Barbara Buell, *Deregulation: A Two Way Street*, BUS. WK., June 22, 1987.

3. Through the post-occupation period, the Ministry of Finance prohibited the expansion of foreign banks. No new license was issued to a U.S. bank already in the country until 1981 when Citibank received approval to open two additional branches. The restrictions have largely ended. Citibank, the only foreign financial institution to take advantage of the authority, now has approximately 20 branches. Letter from John J. Skelly, Vice President Citibank (April 1991) (providing opening dates of all Citicorp branches in Japan).

4. EUROMONEY SUPPLEMENT, Aug., 1986, at 21.

5. European financial institutions operate under a system of universal banking. This enables banks to engage in a host of related financial activities such as the sale of securities and insurance. While the United States still separates the banking, insurance and securities industry, those barriers have been lowered through administrative legerdemain. The Federal Reserve Board has, for example, permitted banks to engage in securities underwriting. *See In re J.P. Morgan, Etc.*, 73 FED. RES. BULL. 473 (1987). Similarly, banks have made some inroads into the insurance industry. *See Am. Ins. Ass'n v. Clarke* 865 F.2d 278 (D.C. App. 1988). Japan's reforms reflect this international trend toward the reduction of barriers separating classes of financial institutions.

6. Article 65 of the Securities and Exchange Law originally prohibited banks from engaging in securities activities. Article 65-3 now authorizes the Ministry of Finance to issue securities licenses to companies owned by banks. Article 43-2 now authorizes the Ministry of Finance to allow securities firms to acquire a majority of a banking subsidiary.
See Amendment [Bill] to the Securities and Exchange Law (Pt. I), *CaMRI Review* No. 25, Apr. 30, 1992.

7. Specifically, Article 43-2 provides that "[a]ny securities company may, upon authorization by the Minister of Finance, acquire or held a majority of shares or a majority of equity contribution . . . of a bank, trust company, or such other financial institutions in a foreign country, a foreign company which is engaged in the securities business or such other companies as may be prescribed by an ordinance of the Ministry of Finance." Article 65-2 provides that "[t]he provisions of Article 65 [prohibiting banks from engaging in securities activities] shall not preclude the Minister of Finance from issuing a license . . . to a joint stock company in which a bank, trust company, or such other financial institution as may be prescribed by a Cabinet order owns a majority of its shares."

While allowing banks and securities firms to enter each other's business, including trust

Moreover, securities firms and commercial banks could operate trust subsidiaries.[8]

The change portended more than a realignment in the classification of banks. The shift promised to accelerate the process of consolidation and a return to the pre-war system dominated by a handful of large city banks.[9] Moreover, over the long term, decompartmentalization should reduce the government's ability to micro-manage the financial markets.

Less obvious, the changes essentially eviscerated a regulatory approach developed by United States and more or less imposed on Japan during the occupation. Allied officials, over the initial opposition of the Japanese government, wanted to segment the financial system, primarily to prevent the large Japanese city banks from absorbing smaller competitors.[10] Compartmentalization, therefore, had its roots in U.S. policies. The exegesis was even more notable given the role of compartmentalization a critical barrier to foreign banking activity in the country.

I. PRE-WAR DEVELOPMENT

The Japanese financial system changed considerably after the Second World War. To be sure, certain characteristics of the pre-war system remained. Both periods saw some degree of segmentation. The distinction between long term and ordinary commercial banks predated the war. So did the highly consolidated nature of the banking system, something that had begun in ernest following financial panics in the 1920s.

When the occupation ended in 1952, however, the banking system had changed in a number of material respects. Trust companies had converted to banks. Securities and banking functions were separated. Special banks were eliminated.

These changes resulted in compartmentalization of the banking system, something that enhanced government control. Designed to facilitate economic recovery, the financial system did not allocate capital through market forces. Instead, capital went where the government thought best. Targeted industries benefitted from a constant supply of funds while

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banking, barriers continued to remain following the legislation. Long term banks still had the exclusive right to issue bonds and debentures to the public. Commercial banks could raise long term funds only through private placements. Otherwise they were limited to short term funds, particularly deposits. In addition, the legislation did not tamper with the barriers separating financial institutions and the insurance industry, although change in that area is under study.

8. The changes did not completely decompartmentalize the banking system. Barriers continued to separate long term and other commercial banks and barriers remained between financial institutions and insurance companies.

9. At least since the 1960s, the Japanese government has encouraged further consolidation in the banking sector. In addition, no new bank has received a license to operate since the 1950s, with the trust subsidiaries of nine foreign banks the only exception. The result has been a decline in the total number of banks in Japan.

10. *See* discussion *infra* Section IV.

others such as the consumer sector suffered.[11]

Compartmentalization facilitated this process. Each category of banks had its prescribed niche in the recovery process. They raised funds from different sources and funnelled them to designated companies or industries. Each category of banks found themselves beholden to the government for funds and, concomitantly, more willing to follow the government's guidance about the scope and direction of loans.

A. *The Early Days*

The financial sector evolved contemporaneously with the emergence of modern Japan and the Meiji Restoration. At the apex of the financial system rested the Ministry of Finance (MoF). Formed in the 1870s, MoF represented the single most powerful bureaucracy in a country of powerful bureaucracies. In charge of the budget, tax, foreign exchange, customs, securities activities, insurance companies and banks, the MoF performed the functions assigned to a dozen agencies and offices in the United States.[12]

Early banking legislation reflected marked outside influence. The initial pattern was modeled after the national banking system in the United States.[13] Adopted in 1872 and subject to important amendments four years later, the Bank Act regulated commercial banks and authorized them to issue currency.[14]

The legislation initially had little effect; only a small number of banks formed.[15] Amendments adopted in 1876 sought to encourage the organization of banks, primarily by doing away with gold denominated reserve requirements. The amendments accomplished the intended goal, with 157 banks forming over the next four years.[16] Some private financial

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11. The inability to obtain consumer loans for cars or household appliances further spurred savings, as did an inadequate system of retirement income.

12. At one time MoF also had control over industry, trade, agriculture, transportation, communications and supervision of local governments. Those duties were taken away in 1898. *See Ministry of Finance*, 5 KODANSHA ENCYCLOPEDIA OF JAPAN 186-8 (1983).

13. HUBERT F. SCHIFFER, THE MODERN JAPANESE BANKING SYSTEM 15 (1962). *See also generally* Thomas F. Cargill, *Central Bank Independence and Regulatory Responsibility: The Bank of Japan and the Federal Reserve*, 2 MONOGRAPH SERIES OF FINANCE AND ECONOMICS, CENTER FOR THE STUDY OF FINANCIAL INSTITUTIONS (1989). (noting that Japanese system based upon the National Currency Act of 1863 adopted in the United States).

14. WILLIAM WIRT LOCKWOOD, THE ECONOMIC DEVELOPMENT OF JAPAN: GROWTH AND STRUCTURAL CHANGE 1868-1938, at 13 (1954).

15. The law had a number of problems. As one commentator wrote: "First, it made the notes issued by the National Banks against the collateral of government bonds redeemable in metal, which, given the public's attitude toward paper money and the deficits and the current balance payments, made it very difficult to keep the notes in circulation. Second, the terms of the law did not provide the banks with a sufficient margin of profit." RAYMOND W. GOLDSMITH, THE FINANCIAL DEVELOPMENT OF JAPAN, 1868-1977 (1983).

16. The amendments also lowered the interests charged on borrowed money. National banks initially had the authority to issue currency. The currency, however, had to supported by sufficient reserves. By altering the requirement of gold reserves, the Bank Act provided

institutions also formed during that period. In 1876, Mitsui became the first private commercial bank and an ordinary commercial bank following adoption of The Banking Act of 1890.

This early approach to financial regulation, however, ultimately had to be scrapped. A rebellion in Kyushu demonstrated inadequacies with the banking system. The government had to increase spending to handle the emergency, causing rampant inflation. With the need for comprehensive reform clear, the Japanese abandoned the system of national banks in the 1880s, instead opting for a central banking system based upon the European model. Specifically, the country focused on the experiences of Belgium, the country that most recently had set up a central bank.

The Bank of Japan (BoJ) came into existence in 1882 and two years later received the exclusive authority to issue currency.[17] The government owned fifty five percent of the central bank's stock and appointed the Governor, Vice-Governor and a number of other bank officials. The governor tended to be either a career employee within the central bank, a retired official from the MoF, or a private banker, typically from the YSB.

The modern commercial banking law emerged in 1890.[18] Apparently designed to promote expansion, the Bank Act contained few constraints.[19] There were no restrictions on non-banking activities, loan limits, capital or reserve requirements.[20] Deposit insurance did not exist. The result was predictable: rapid growth of rickety financial institutions, an unstable mix that would haunt the financial system until the war.[21]

The number of commercial banks proliferated, at one point climbing to almost 2,000.[22] Most banks were small, with almost half having capital of less than 100,000 yen.[23] This number began a gradual decline after the turn of the century when minimal capital requirements were estab-

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considerable impetus for the formation of banks and the issuance of currency. *See* SCHIFFER, *supra* note 13, at 16.

17. The BoJ received the authority with the adoption of the Convertible Bank Note Act of 1884 (law under which "the authority of such national banks was abolished and all notes were unified into the Bank of Japan notes."). *See also* SCHIFFER, *supra* note 13, at 16.

18. FEDERATION OF BANKERS ASSOCIATION OF JAPAN [ZENGINKYO], THE BANKING SYSTEM IN JAPAN 26 (1989).

19. *See Recent Developments in Japanese Banking*, FED. RES. BULL., July, 1923, at 805 ("The reason for the large number of banks to be found in the peculiar banking legislation of Japan, which, in accordance with the desire of the Government to spread banking facilities all over the country, made the opening of banks dependent upon very few requirements.").

20. *Id.*

21. *See* FUJI BANK, LTD., BANKING IN MODERN JAPAN (2d ed. 1967).

22. The precise number of banks at the turn of the century appears to have been 1867. *See* THE BANKING SYSTEM, *supra* note 18, (putting number at 1867 in 1901).

23. G.C. ALLEN, JAPAN'S ECONOMIC EXPANSION 56 (1965). The largest banks, of course, had much greater capital. *See* YASUO MISHIMA, THE MITSUBISHI: ITS CHALLENGE AND STRATEGY 179 (1989) ("In 1915, the capital of the Banking Division [of Mitsubishi] was only Y1 million compared with Y20 million for the Mitsui Bank Y21.5 million for the Dai Ichi Bank Y10 million for the Yasuda Bank, and Y7.5 million for the Sumitomo Bank.").

lished,[24] although the total number of branches continued to grow.[25] Some of the decline came from bank failures, with 956 becoming insolvent between 1905 and 1936.[26] Reduction in numbers also resulted from an increasing number of mergers.[27] The larger banks benefitted from the consolidation process, with deposits and business flocking to healthier financial institutions.

The real turning point and the end of atomistic banking occurred with the panic of 1927. The collapse of the Bank of Taiwan sent shock waves through the Japanese financial system.[28] The Bank had lent considerable sums to Suzuki & Co., the newest industrial group. With Suzuki tottering, a number of Japanese banks called in short term loans to the Bank. Unable to raise funds, the Bank of Taiwan turned to the BoJ. When funds were not forthcoming, the bank collapsed. As one government report put it: "This caused great alarm and resulted in runs on banks throughout the whole country."[29]

With no system of deposit insurance, any threat to the integrity of the financial sector sparked panic. The failure of the Bank of Taiwan proved no exception. Depositors began to withdraw funds. The BoJ pumped money into the system to ensure liquidity, but the need for more systematic reform was clear.[30] The government responded with the Banking Law of 1927.[31]

The 1927 Law gave the government considerable control over the financial sector. All banks operating within the country had to obtain a license and could not open, close or move a bank branch without approval of the Ministry of Finance. The Law also attempted to establish a bank-

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24. The decree established minimum levels of 500,000 yen for joint stock banks and 250,000 yen for private banks. ALLEN, *supra* note 23 at 56.

25. By the end of 1920, the number of branches had increased to 5,097. *Id.*

26. Hugh Patrick, *Japanese Financial Development in Historical Perspective, 1868-1980, in* COMPARATIVE DEVELOPMENT PERSPECTIVES (Gustav Ranis, et al. eds., 1984).

27. *Id.* at 312 (noting that between 1905 and 1936, 956 banks failed; 1,333 were merged). *But see supra* note 19, at 2 ("The collapse of small, unsound banks accounted for a greater part of the decline, which consolidation was a minor factor.").

28. An earlier run apparently resulted from discussions in the Diet over the government's desire to delay payments under guaranties that arose out of the Great Earthquake of 1923. Schiffer, *supra* note 13, at 20. In addition, competence in the financial system was shaken by publicity that certain large banks, including the Bank of Taiwan, were unsound because of a deteriorating loan portfolio. DILEMMAS OF GROWTH IN PRE-WAR JAPAN 247 (James W. Morley ed., 1971).

29. *Annual Report of the Bank of Japan*, FED. RES. BULL., May 1928, at 331.

30. *See id.* at 331 ("When the panic broke out, first in March and again in April, we disregarded our usual practice and gave liberal accommodation to all banks applying for funds to meet withdrawals of deposits; we extended credits directly and freely even to institutions which had no previous business connections with us; and in cooperation with the Government and leading banks we endeavored to tide over the crisis and stabilize the situation.").

31. The Law was substantially revised in 1981. *See* The Banking Law, Law No. 59 of June 1, 1981, Arts. 8 & 9 (Japan).

ing system based upon short term loans,[32] by restricting commercial banks to limited duration loans, leaving long term credit to special institutions.[33] Additionally, the law imposed limitations on non-banking activities, although not securities activities.

The Banking Law of 1927 remained in place, without significant change, until 1981.[34] The longevity had one major explanation: ambiguity. The Law contained little more than an outline of a regulatory scheme, providing MoF with considerable discretion. With little or no regulatory augmentation, MoF used the 1927 Law to totally reshape the financial system after the war.

Commercial banking was not the only financial sector to experience reform and consolidation. The 1920s also saw efforts to reform trust companies. Subject to almost no regulation, trust companies had proliferated. As with banks, economic uncertainties in the 1920s precipitated a number of failures. The adoption of the Trust Law and the Trust Business Law in 1922 subjected the companies to extensive regulation. The 1922 Law gave MoF authority to license trust companies, and was used aggressively to pare numbers. Most large trust companies formed during this period, including Mitsui, Yasuda, Sumitomo, Mitsubishi and Nippon.[35] Able to pay higher yields than banks, the companies thrived. They grew in size and rivaled the large commercial banks.[36]

Following adoption of the legislation, trust companies witnessed a dramatic decline in numbers. The number fell from 488 to thirty seven by 1928 and to six by the end of the war.[37] The decline in numbers did not, however, mean a diminishing market share. Quite the contrary. Trust companies, perceived as a haven from the uncertainties confronting banks and deposits, actually grew as their numbers decreased.[38]

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32. *See* Henry C. Wallich, and Mabel I. Wallich, *Banking and Finance, in* ASIA'S NEW GIANT 279 (1976).

33. *Id.*

34. *See* The Banking Law, *supra* note 31.

35. Mitsui was formed in 1924; Yasuda and Sumitomo in 1925 and Mitsubishi and Nippon in 1927.

36. *See The Capital Market*, THE ECONOMIC DEVELOPMENT OF JAPAN AND KOREA: A PARALLEL WITH LESSONS 165 (Chung H. Lee and Ippei Yamazawa eds. 1990).

37. *See* Fujino, *A Comparison of Trusts in the United States and Japan*, CENTER FOR INTERNATIONAL AFFAIRS AND THE REISCHAUER INSTITUTE OF JAPANESE STUDIES 87-17, at 10 (1987).

38. MONEY AND BANKING IN JAPAN, BANK OF JAPAN, ECONOMIC RESEARCH DEPARTMENT, (S. Nishimura trans. L.S. Pressnell ed., 1973). *See also Annual Report, supra* note 29. ("Following financial panic of 1927, there 'was an active transfer of funds from the secondary and minor banks to the larger banks, trust companies, and the Post Office Savings Banks;"). Three trust companies controlled the bulk of the business. *See* MISHIMA, *supra* note 23, at 253 ("The percentage Mitsui, Mitsubishi, and Sumitomo accounted for among the total trust properties, also increased from 47% in 1927 to 53% in 1928 and to 54% in 1929.").

B. *Special Banks*

In addition to commercial banks and trust companies, the Japanese financial system rested on a bed of specialized financial institutions. Special banks served particular functions such as financial services in occupied territories, foreign exchange, and long term lending to particular segments of the economy. Special banks represented the primary vehicles for government intervention into the financial system.

Representing the first of the special banks, the Yokohama Specie Bank (YSB), to a large degree set the pattern. The YSB addressed a specific void in the financial system. Designed to engage in international trade activity, the bank was intended to weaken the monopoly of foreign banks over trade finance in Japan.[39] Formed in 1880, the YSB again demonstrated the government's willingness to rely on foreign models. The Bank patterned it's charter after the one used by the Hong Kong & Shanghai Bank.[40] In forming the bank, the government retained considerable influence over the institution, appointing the President and Vice-President,[41] supplying one-third of the bank's initial capital, and providing advantageous low interest loan financing.[42]

The YSB quickly became heavily involved in trade finance, ultimately creating an extensive network of foreign offices. The Bank opened a London office in 1884 and by 1902 had branches in France, the United States, India, Hong Kong and China.[43] An overseas presence allowed the YSB to compete with the foreign banks. Particularly during the First World War, the YSB seized considerable business from European competitors.[44]

The Hypothec Bank of Japan filled another void in the financial system. Authorized to issue long-term debt, the bank primarily made agricultural loans, secured by real property, for terms as long as fifty years.[45]

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39. G.C. ALLEN, A SHORT ECONOMIC HISTORY OF MODERN JAPAN 1867-1937 53 (1962). *See also* GOLDSMITH, *supra* note 15, at 50. The bank received the authority to engage in foreign exchange activity six years after formation.

40. *See* FRANK H.H. KING AND CATHERINE E. KING, *The Hong Kong Bank in the Period of Imperialism and War 1885-1918*, THE HISTORY OF THE HONG KONG AND SHANGHAI BANKING CORPORATION, 94-96 (1987- 1991).

41. ALLEN, *supra* note 39 at 53. The only serious competition for trade finance came from branches of foreign banks. *Id.* at 108.

42. *See* SCHIFFER, *supra* note 13, at 17 (noting that ⅓ of initial capital provided by government with additional funds from Treasury; after government funding ended, Bank of Japan authorized to make low interest loans).

43. JAPANESE FINANCE DEPARTMENT, AN OUTLINE OF BANKING SYSTEMS IN JAPAN 12 (1905).

44. *See* FED. RES. BULL., *supra* note 19, at 804, 806. ("The European war and the fluctuation of most European currency is after the war restricted and hampered to a large degree the activities of the European banking institutions, with the result that their business was taken over by Japanese banks.").

45. *See* SCHIFFER, *supra* note 13, at 18. The Hypothec bank could issue long-term debt, although not in excess of ten times capital.

The Hypothec Bank could raise funds by issuing debentures but had only limited deposit taking authority.[46] This restriction on deposits began the practice of dividing banks by funding source, something that would remain an attribute of the post-war banking system.

The Hypothec Bank also worked closely with the agricultural and industrial banks, a network of agrarian based financial institutions located in each prefecture.[47] Once again, the government retained considerable control over the bank and guaranteed the dividend payment for the first ten years of its existence.

Formed four years later, the Industrial Bank of Japan (IBJ) had as its principal goal the extension of long-term loans to Japanese industry, typically for five year periods. The IBJ channelled funds to "established large industries, especially for shipbuilding companies, iron and steel factories, and public utilities."[48] To obtain the long term financing necessary for the loans, the IBJ received debenture issuing authority.

In addition to servicing industry, the IBJ to some degree facilitated foreign investment. A large portion of its capital came from overseas.[49] The bank floated bonds in England and France in 1908 and in New York in 1924.[50] As with the other special banks, the government's guiding hand was readily apparent, including a dividend guarantee comparable to that received by the Hypothec Bank.[51]

Intended to facilitate development of Japan's northern most island, the Hokkaido Takusiyoka Colonial Bank received debenture issuing authority. The government also formed financial institutions in occupied territories including the Bank of Taiwan and the Bank of Chosen in Korea both of which acted as central banks for those areas.[52]

Special banks maintained close ties with the government. In addition to dividend guarantees and some financing, MoF typically appointed key officers.[53] The banks also performed tasks assigned by the government. The Bank of Japan conducted activities in overseas territories through the YSB. MoF, by comparison used the IBJ to implement domestic policies. Following the great earthquake in 1923, the IBJ at the behest of the government funneled aid to small borrowers. Similarly, after the financial crisis of 1927, the government again channeled funds to small borrowers through the IBJ. At the end of 1929, IBJ had more than Y35 million in

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46. *Id.*

47. ALLEN, *supra* note 39, at 54. The Hypothec Bank gradually took control of these banks after 1921, operating them as branches. *Id.* at 108.

48. SCHIFFER, *supra* note 13, at 18.

49. *Id.* at 19.

50. Herbert M. Bratter, *Japan's Special Bank for Industrial Financing*, THE FAR EAST REV., Oct. 1930, at 574. The article also contains a list of companies financed by the IBJ.

51. ALLEN, *supra* note 39, at 54.

52. SCHIFFER, *supra* note 13, at 19.

53. ALLEN, *supra* note 23, at 55.

loans to "petty merchants and manufacturers."[54]

C. *Control and Consolidation*

In addition to reforming the financial system, the Banking Law of 1927 also accelerated the process of consolidation in the banking community. Capital standards were raised and a policy was announced favoring further "amalgamation" of commercial banks. Over half of the existing banks did not meet the new capital standards requiring them to either find the necessary capital, merge or liquidate.[55]

From a high of almost 2000 banks at the turn of the century, the number of banks began to fall, a process that accelerated as the war began.[56] The number of commercial banks fell from 683 in 1931 to 377 in 1937 and sixty one in 1945.[57] By the end of the conflict, the four zaibatsu banks, Teikoku (a combined Mitsui and Dai-Ichi), Yasuda (Fuji), Mitsubishi and Sumitomo, held 74.9 percent of all bank loans.[58]

The trend toward consolidation did not exempt larger banks. Sanwa, a name meaning three harmonies, formed in 1933 as an amalgamation of three banks Osaka, Yamaguchi and Konoike.[59] Tokai formed in 1941 through the combination of three banks in the Nagoya area. More spectacularly, Mitsui and Dai-Ichi, two of the largest and oldest banks united under the Teikoku banner in 1943. Nor was the trend limited to urban centers. MoF continued to push for consolidations outside of cities under the premise of "One Prefecture, One Bank."[60]

The consolidation policy was not primarily motivated by efficiency; control represented the preeminent concern. "The aim was not so much to consolidate the banks' business as to strengthen financial control, such as the promotion of the Easy Money Policy, the improvement of government bond marketing, and the provision of funds for munitions industries."[61]

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54. BRATTER, *supra* note 50, at 575.

55. JAPANESE FINANCE DEPARTMENT, *supra* note 43, at 2.

56. KOZU YAMAMURA, ECONOMIC POLICY IN POST-WAR JAPAN 24 (1967).

57. Pressnell, *supra* note 40, at 26 & 39. Of the five largest banks at the end of the War, only one, Sanwa, was a non-Zaibatsu bank.

58. Yasuda (1880), Mitsui (1876), Sumitomo (1895), Mitsubishi, and Dai Ichi (1872), had 28.1 percent of all deposits held by commercial banks in 1930. SCHIFFER, *supra* note 13, at 21. *See also* PATRICK, *supra* note 27, at 312 (stating that "Big 5" had 30 percent of all bank loans and deposits by 1930).

59. The bank also ultimately absorbed Sanwa Trust Company.

60. *See* Takeshi Otsuki, *The Banking System of Japan*, ORIENTAL ECONOMIST, July 7, 1951, at 521 ("As a result, a financial administrative principle of having only one bank for each prefecture was set up, and legal measures to facilitate the merger of banks were adopted."). A number of large banks emerged from the process. Bank of Kobe was formed in 1936 from a merger of seven banks in Hyogo Prefecture; Saitama in 1943 from the four largest banks in Saitama Prefecture.

61. L.S. Pressnell, at 38. *See also* GOLDSMITH, *supra* note 15, at 118 ("The process of concentration proceeded through the 1930s and accelerated during the war, being fostered by the government and becoming practically compulsory during the second half of the pe-

As the conflict war in accelerated, so did government control over the banking system. To some degree, the large Zaibatsu banks had represented counterweights to government influence. They could count on capital and deposits from member companies and, in an unstable financial environment, the balance of individual deposits.[62] Not dependent upon the BoJ for funds, these financial institutions had considerable practical independence from government oversight.[63]

As Japan shifted to a wartime economy, however, the role of government greatly expanded. The government, particularly the MoF, aggressively intervened into the financial markets to pursue war related policies. Commercial banks became government controlled conduits for funneling capital to war related industries. The MoF encouraged this process by guaranteeing loan repayments. While the role of particular banks varied, the entire financial system generally operated to facilitate the government's military exploits.[64]

Similarly, the relatively high degree of independence enjoyed by the BoJ came to an end.[65] Loss of independence occurred in 1942 with the adoption of a law acceding to the Ministry the authority to order the BoJ to implement particular policies.[66] In the post-war period, control would be further tightened through the practice of appointing retired MoF officials as Governor of the central bank.

Thus, by the time the war ended, certain distinct attributes had appeared that would remain central to the post-war banking system.[67] In-

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riod, as the government felt that the financing of rearmament and war could be more efficiently handled by a smaller number of large banks, which could be more easily controlled by the government.")

62. Samuel E. Neal and Raymond Vernon, *Japan Has a Bank Problem*, BANKING, Oct., 1946, at 46 ("And finally the prestige of the Zaibatsu name, bearing with it a reputation for soundness and stability which carried great appeal for people plagued with bank failures and defalcations, served the clinch the Zaibatsu position in the competitive race for deposits.").

63. Some even viewed the Ministry as a captive of the Zaibatsu banks. *See id.* at 45, 118 ("Until the middle 1930's this control by the Zaibatsu was overt and absolute. The Finance Minister almost invariably was a career employee of one of the Zaibatsu families. After 1930, the control of the Ministry by the Zaibatsu was more discrete but hardly less effective.").

64. For a more detailed discussion of the government subjugation of banks during the war, see W. TSUTSUI, BANKING POLICY IN JAPAN 13-17 (1988).

65. *See* TAKAFUSA NAKAMURA, THE POSTWAR JAPANESE ECONOMY 139 (1981) (noting that prior to the war, "the Bank of Japan had preserved a relatively independent position vis-a-vis the Ministry of Finance . . . .").

66. *See* Art. 42 of Bank of Japan Law (BoJ "under the supervision of the competent Minister [of Finance]."). *See also* RICHARD A. BANYAI, MONEY AND BANKING IN CHINA AND SOUTHEAST ASIA DURING THE JAPANESE MILITARY OCCUPATION 1937-1945 (1974); T.F.M. ADAMS & IWAU HOSHII, A FINANCIAL HISTORY OF JAPAN 99 (1972) (noting the MoF received authority to approve discount rate and fix note issue limit and to "direct the bank . . . to undertake any business, to change its statutes, or to take any other necessary action.").

67. For a discussion of charges in the financial system immediately before and during the war, see Yasuo Noritake, *The Development of Monetary and Banking System in Ja-*

creasingly, banks became divided by function. Long term banks, foreign exchange banks and trust companies all performed specialized functions. At the same time, the financial industry emerged from the conflict highly concentrated and subjected to considerable government control.

II. REFORM AND THE OCCUPATION

The post-war system of financial regulation can only be understood in the context of the immense capital shortage that occurred in the aftermath of the Second World War. War-torn, an empire sheared away, Japanese industries confronted the herculean task of rebuilding and converting to civilian production. Doing so required capital; capital that could not be repaid until retooling had finished and markets reestablished.

Raising capital posed immense hurdles. With individuals primarily concerned about food and shelter, the thought of investing limited resources into risky ventures such as corporate stock had little appeal.[68] The ability to sell stock was also constrained by dysfunctional markets and the absence of a history of this type of investment. In addition, allied policies designed to break up the Zaibatsu, the large Japanese industrial complexes, flooded the market with shares, further crowding out companies attempting to raise funds.

Still, something had to be done. Japanese companies desperately needed capital. The primary answer was to be banks. Companies had historically relied on banks for most of their capital needs. Resort to bank financing in the post-war period was not simply a return to the past. Use of banks as capital purveyors went well beyond earlier levels. Dependency upon bank financing evolved into a system of credit rationing and government control of industrial policy.

During the occupation, a rigid regulatory structure descended. With other investment alternatives unavailable, individuals had little choice but to deposit excess yen in banks. The funds were lent to capital starved companies. The aggregation of small deposits supplied a significant portion of the capital needs of corporate Japan.

Deposits, however, were not enough. Funds had to come from somewhere else. The solution was to be the government, specifically the Bank of Japan. Through the discount window, the government provided city banks with considerable additional funding. The practice, however, also created leverage. The threat of reduced funding enabled the government to dictate to banks which companies and industries were eligible for credit. Control of credit permitted control of industrial policy.

Compartmentalization facilitated control. The financial system con-

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pan, 1932-1945, 1 KOBE U. ECON. REV. 69 (1955).

68. *See* THOMAS PEPPER, MERIT E. JANOW & JIMMY W. WHEELER, THE COMPETITION DEALING WITH JAPAN 146 (1985) ("World War II and the postwar financial difficulties virtually destroyed private accumulations of capital in Japan.").

tinued to divide banks both by source of funding and by function. Commercial banks were meant to be a source of short term financing for Japanese industry, although as a practical matter loans were constantly renewed. They could not sell debentures or otherwise raise long-term funds.[69] Funds came almost entirely from deposits, with loans from other financial institutions and the BoJ playing an important role.[70]

Special banks were eliminated. In their place however, appeared three long-term banks. These financial institutions arose out of the need to provide Japanese businesses with longer term financing. They were allowed to sell debt with maturities of one year or five years and were expected to provide corporate Japan with financing of a more significant duration.[71] The authority to sell bonds came at a price. The banks could not accept retail deposits.[72] Given the insatiable need for capital, the three long term banks had commercial relationships with most, if not all, of the leading Japanese corporations.

The occupation also saw the creation of additional classes of banks. Specifically, trust companies were given increased authority and allowed to operate as banks.[73] Trust banks raised funds neither through debentures nor, in significant amounts, through deposits.[74] Instead, the primary mechanism was the loan trust certificate, funds left with the bank for a term of three years at fixed interest rates. The funds were then lent to industries designated by the MoF, effectively providing another source of long term financing for corporate Japan.[75]

MoF also segmented banks geographically. City banks generally

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69. *See* 20 MINISTRY OF FINANCE FINANCIAL HISTORY SECTION, THE FINANCIAL HISTORY OF JAPAN, THE ALLIED OCCUPATION PERIOD 1945-1952, at 65-66 (1982). As a practical matter, Japanese commercial banks consistently renewed short-term loans, effectively transforming them into long-term financing. *Id.* at 33.

70. *Id.* The call money market involved short-term loans among banks. To the extent a financial institution had excess, unused funds, they would lend them to other over-loaned banks, particularly city banks. The government exercised considerable influence over the market, including the determination of interest rates. *Id.* at 68.

71. Long Term Bank Credit Law, Law No. 187 of 1962.

72. *Id.* at 39. They could, however, accept certain government deposits and deposits from borrowers. The three long-term banks are the Industrial Bank of Japan, the Long-Term Credit Bank of Japan and the Nippon Credit Bank. *Id.*

73. Trust banks are commercial banks with trust authority. Commercial banks received the authority to engage in trust activities during the war. *See* Commercial Bank's Additional Operation of Trust and Savings Bank Business Act, Law No. 43 of 1943. Following the occupation, however, the Ministry of Finance used administrative guidance to force most city and regional banks out of the area. That left the trust business to a specialized class of commercial banks.

74. MoF did this in large part by limiting the number of trust bank branches.

75. Only one city and seven trust banks had the power to manage and invest client funds, eliminating a source of profits for other institutions. Trust banks also managed pension plan assets, a lucrative business shared with insurance companies. The seven trust banks are: Mitsubishi Trust, Sumitomo Trust, Mitsui Trust, Yasuda Trust, Toyo Trust, Chuo Trust, and Nippon Trust. Daiwa represents the only ordinary commercial bank with trust powers.

could expand only in the principal urban centers, particularly Tokyo and Osaka, and only on a limited basis. Regional banks, typically smaller, tended to operate in a single prefecture. These banks essentially amounted to conduits for deposits in less urban areas. Often unable to find sufficient corporate borrowers, regional banks lent excess funds to cash starved city banks. City banks in turn lent them to industries designated by the government.

The post-war system also preserved distinctions between domestic and international banks. The MoF severely restricted the overseas expansion of Japanese banks. The Bank of Tokyo, the successor to the YSB, became the only bank registered under the Foreign Exchange Bank Law and obtained the greatest share of overseas offices.[76] Only the largest city banks could maintain an international presence, and even that occurred on a limited scale. MoF did not permit long term or trust banks to go abroad until the early 1970s.[77]

Finally, commercial banks were prohibited from selling securities, an activity left to the emerging class of Japanese brokers. With origins traceable directly to comparable provisions in the U.S., the ban meant that banks could not sell stocks or bonds for corporate clients.[78] The loss of this potential source of profits made the banks more dependent upon commercial lending and more susceptible to government control. The restrictions also helped stymie development of the stock market and gave rise to a group of securities firms that would ultimately prove fierce competitors of the banks.

Not entirely a Japanese creation, the system of compartments was implemented with the explicit support of United States officials running the country during the occupation. Compartmentalization had a dual purpose. Foremost, it increased competition, a noticeable attempt to undo some of the concentration in the financial sector that had occurred during the war.

The other purpose was more subtle. Compartmentalization also facilitated credit rationing. Credit rationing allowed funds to be directed to industries considered by allied officials to have high priority in the economic recovery process. The U.S., therefore, encouraged and became at least in part responsible for the shape of the post-war financial system and the high level of government involvement in the system.[79]

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76. *See* discussion *infra* note 211.

77. Long term and trust banks only began opening overseas branches in the 1970s. Most were concentrated in New York and London.

78. Although the separation was imported from the United States, the purpose was entirely different. The separation of securities and banking functions in the U.S. arose in part out of the belief that the intertwining of the two caused the Great Depression. In Japan, the U.S. separated the two industries entirely to prevent city banks from monopolizing the brokerage business, thereby creating an additional class of competitors. *See* text *infra* note 183.

79. Government control was consistent with the articulated SCAP policy first of favor-

A. *The Occupation Descends*

The United States initially wanted no responsibility for the economic and social chaos that followed termination of the war. In line with this early approach, occupation officials received explicit instructions not to assume control of the financial system.[80] The stated goal of the occupation was "demilitarization and democracy." Military officials, therefore, had as a primary purpose the denuding of Japan's means to make war and transformation of the autocratic government into a democracy. In other words, the early goals did not include Japanese economic reconstruction.[81]

Financial sector oversight fell to the Economic and Scientific Section (ESS) of the Supreme Commander of Allied Powers or, more commonly, SCAP. ESS had responsibility for oversight of economics, labor, finance, and science and included "[a]ll of industry, foreign trade, price control, rationing, antitrust activities, and economic statistics . . . ."[82] With respect to banking, however, the ESS initially had relatively constrained authority.

The ESS was to take "no steps to maintain, strengthen, or operate Japanese financial structure except insofar as may be necessary for achievement of provisions of this directive."[83] Officials could shut down banks involved in the war efforts but otherwise could do so "only for purposes of introducing control, removing objectionable personnel or taking measures connected with blocking [the] program, . . ." and were instructed to "re-open[] these banks as promptly as possible; . . ."[84]

SCAP, therefore, had been told essentially to leave control of the financial system to the Japanese. This meant working closely with the BoJ

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ing specified industries critical to the country's recovery and later those promoting exports.

80. JCS 1380/15, paras. 13, 13a, and 35a, *cited in* THEODORE COHEN, REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL 139 (1987).

81. *See* United States Initial Post-Defeat Policy Relating to Japan: SWNCC 150-3, Aug. 22, 1945, *reprinted in* THE FINANCIAL HISTORY OF JAPAN, *supra* note 70, at 65-66 ("The policies of Japan have brought down upon the people great economic destruction and confronted them with the prospect of economic difficulty and suffering. The plight of Japan is the direct outcome of its own behavior and the Allies will not undertake the burden of repairing the damage.").

82. COHEN, *supra* note 81, at 87. The reach of the Section was extraordinarily broad. As Cohen noted, "[i]ts responsibilities reached into every cranny of Japanese everyday life, and its chief was pulled into almost every problem of significance." *Id.* Through most of the occupation (1946-1952), Major General William F. Marquat headed the Section.

83. *Id.* The ESS also had the authority to take "such financial measures as may be deemed necessary" including "[t]he closing of banks."

84. Incoming message WX61967 Washington radio, General Headquarters U.S. Army Forces Pacific, Adjutant General's office. Radio and Cable Center, SCAP Records, Suitland, Md. (Sept. 9, 1945). *See also* Monograph No. 39, Money and Banking, GHQ, SCAP, at 1 ("The basic Occupation directives required the Japanese authorities, rather than SCAP, to plan and direct the reform of Japan's banking system so that it could make its full contribution to the development of a democratic, peaceful and stable economy capable of supporting the Japanese people and maintaining trade relations with the free nations of the world.").

and MoF. Officials in the Economic and Scientific Section supported the approach. They knew that anything foisted upon the MoF without its consent would be undone as soon as the occupation ended. Cooperation was therefore deemed crucial.[85]

Day to day oversight remained in the hands of Japanese regulators, although the Finance Division regularly reviewed and often modified the actions of the MoF and Central Bank. SCAP occasionally intervened directly. Occupation officials prohibited mergers absent express approval.[86] In the end, however, the Japanese exerted considerable influence over the direction of financial reforms.[87]

MoF retained its position as the critical voice in the financial markets in large part due to its deliberate decision to deal with SCAP directly. Most other ministries relied on the central liaison office, an office primarily staffed by officials from the Ministry of Foreign Affairs who spoke English. Unwilling to accept them as intermediaries, the proud MoF instead set up a liaison office of its own. Lacking sufficient staff with fluency in English, officials were, for the first time, hired laterally. Equally unusual, MoF agreed to accept a number of personnel who had not graduated from an Imperial University.[88]

MoF, with considerable assistance of the liaison office, retained a close working relationship with occupation officials.[89] The liaison made frequent visits to the Economic and Scientific Section of SCAP, with meetings often occurring twice a day. In addition, the Minister of Finance met with ESS officials on a weekly basis. Interaction between the two groups was extensive.

> [The staff of the Finance Division] had very close contact [with Japanese banking officials]. We saw representatives of the Ministry of Fi-

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85. Interview with Tristan Beplat, Chief, Banking Section, ESS (Mar. 1992). One commentator concluded that the decision to leave the Japanese government in place resulted from "the grossly insufficient number of Japanese-language personnel among the Allied powers and because of lack of familiarity with Japanese administrative procedures, . . ." ELEANOR M. HADLEY, ANTITRUST IN JAPAN 67 (1970).

86. *See* Merger of Financial Institutions, SCAPIN 759, Feb. 21, 1946. MacArthur Museum, Norfolk, Va. (prohibiting any bank merger, consolidation or amalgamation absent SCAP approval). *See also* Memorandum from Walter K. LeCount, Chief, Finance Division, Re: Merger of Seiwan Savings Bank with Aomori Shogyo Bank, To: Ministry of Finance, 004.2 ESS/FIN, SCAP Records, Suitland, Md. (Jan. 29, 1949) (approving merger).

87. *See* CHALMERS A. JOHNSON, MITI AND THE JAPANESE MIRACLE (1982).

88. By the time the war had begun, the practice of accepting personnel almost exclusively from the University of Tokyo had become entrenched. A handful of exceptions to this practice had occurred, however. Ikeda Hayato, future Finance Minister and Prime Minister, joined the Ministry of Finance in 1925 after graduating from the law faculty at Kyoto University. Nonetheless, even these exceptions all involved one of the prestigious imperial universities. The hiring of Gengo Suzuki, who graduated from a University in Taiwan, to work in the liaison office was an exception even to the usual practice of hiring from imperial universities.

89. The liaison office was first headed by Takeo Fukuda, who later became Prime Minister, then Nobutane Kiuchi, who later headed the Foreign Exchange Control Board.

> nance, Bank of Japan and the banks everyday. For example, there was a group in the Finance Division that was responsible for dealings with the Trust Banks Association. . . . It was also in the Finance Division a special section that dealt with the Ministry of Finance. There was a group that had daily liaison with the Bank of Japan. When it came time to reorganize the banks, the Finance Division studied every reorganization plan and then went over it again with the Bank of Japan. Each proposal that came out of the Finance Division was carefully gone over before it was approved.[90]

A weekly meeting was also held between the MoF and General Marquat, head of ESS.[91]

The MoF played a critical role in shaping the banking system. Officials within the ESS relied extensively on Ministry input. This reflected in part a lack of expertise and part prudence. Any reforms imposed over MoF's objection would simply be reversed when the occupation ended. The ESS, therefore, worked hard at devising reforms that gained the acquiescence of the MoF.

Not surprisingly, the system that emerged preserved many pre-war vestiges. Special banks survived, albeit in a slightly altered form. Despite their role in the war efforts, the Industrial Bank of Japan and Bank of Tokyo (ne Yokohama Specie Bank) survived. Concentration remained pronounced; comprehensive reform of the entire financial system never occurred.

B. *The Penalty Phase*

Consistent with the initial approach toward Japan, early banking polices were largely punitive. Occupation officials wanted to ensure that the pre-war system in Japan did not return. Initial efforts focused upon disbanding the institutions associated with the war effort and expunging the individuals deemed responsible. Elimination of the Zaibatsu freed the core banks to make loans to companies not in the industrial complex.[92] Occupation officials also closed and liquidated most special banks.

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90. THE OCCUPATION OF JAPAN: ECONOMIC POLICY AND REFORM, (Lawrence H. Redford ed. 1978) (statement by Tristan Beplat, former Chief of the Banking Section of the Economic and Scientific Section of SCAP).

91. Conversation with Gengo Suzuki, Former Chief, Liaison Office, Ministry of Finance, Tokyo, (Mar. 1992).

92. In November 1945, SCAP approved a plan in which shares owned by the four largest Zaibatsu, Mitsui, Mitsubishi, Sumitomo and Yasuda, were to be transferred to the Holding Company Liquidation Committee and ultimately sold. The HCLC did not actually begin selling the shares until August 1946. ADAMS & HOSHII, *supra* note 66, at 23. Teikoku Bank was the principal bank for the Mitsui Zaibatsu. The bank formed from an amalgamation of Mitsui and Dai-Ichi banks in April 1943. Monograph No. 39, *supra* note 84, at 9 n.2. Until creation of the Commission, the status of designated companies could not change and shareholders could not sell stock in the companies. Ultimately, several hundred firms were designated as "Restricted Concerns." ADAMS & HOSHII, *supra* note 66. The Commission began functioning in August 1946, *id.*, and was dissolved five years later. *Id.* at 24.

Application of these policies to the financial sector began almost immediately upon cessation of hostilities. By memorandum dated September 30, 1945,[93] allied forces announced the closing of "all banks and other financial institutions whose paramount purpose has been financing of war production or control of financial resources of occupied territories."[94] The Japanese government received instructions to "immediately close and not allow to reopen" the designated institutions. The principle officers were to be "discharge[d] and summarily remove[d] from office . . ."[95] MoF had to "present at the earliest possible date proposals for the liquidation of all closed institutions,"[96] with the BoJ ultimately overseeing the process.[97]

The unremarkable decision was dramatized by the method used to publicize the closings. After the business day ended, military personnel swiftly occupied twenty one Japanese financial institutions, including The Bank of Taiwan, Bank of Chosen, BoJ, The Hypothec Bank, the YSB,[98] and the only two foreign banks remaining in the country.[99] The action occurred without warning; employees were ordered out of the building without time to clear their desks.[100] The occupying forces also prohibited overseas communication absent their approval,[101] cutting off contact with

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93. The closing of the financial institutions in the occupied territories was intended to be the first step in economically separating Japan from those countries. *See* Cincafpac-Adv. to Comgen Usafik-Opnl priority, SCAP Records, Suitland, Md. (Sept. 29, 1945) ("At 1600 hours in 30 September CMA wartime finance banks in Japanese branches of foreign banks CMA including Bank of Chosen and Bank of Taiwan will be closed by direct action of this headquarters PD you should insure adequate publication in Korea to emphasize the closing of Japanese branches of Bank of Chosen is an integral part of the program to separate Japanese and Korean economy and to divert Japanese of all control over Bank of Chosen and its assets PD you should keynote the fact that the closing of Japanese branches will improve the position of the Bank of Chosen in Korea.").

94. Extract of Allocation of Staff Responsibilities for Execution of JCS Directives, SS Responsibilities in Japan, SCAP Records, Suitland Md. (Mar. 4, 1947). *See also* Draft Financial Directive for Japan, inter-office communication (for information), Treasury Department, from Mr. White, Assistant Secretary of the Treasury, to Secretary Vinson, Aug. 28, 1945, *reprinted in* THE FINANCIAL HISTORY OF JAPAN, *supra* note 69, 2-23, at 143.

95. Closing of Colonial and Foreign Banks and Special Maritime Institutions, SCAPIN 74, Sept. 30, 1945. MacArthur Museum, Norfolk, Va. *See also* Supplemental Instructions pertaining to the Closing of Financial Institutions, SCAPIN 104, Oct. 8, 1945. MacArthur Museum, Norfolk, Va. (detailing practices with respect to employees of closed institutions).

96. Oral Instructions Given to Ministry of Finance on 30 Sept. 1945, SCAPIN 73 MacArthur Museum, Norfolk, Va. (Sept. 30, 1945). *See also* Appointment of a Liquidator of Branches, SCAPIN 163 MacArthur Museum, Norfolk, Va. (Oct. 20, 1945) (appointing BoJ as liquidator of closed institutions and directing prompt submission of plan of liquidation).

97. Monograph No. 39, *supra* note 84, at 15 (noting that by beginning of 1946, BoJ had become fiscal agent for all closed institutions).

98. Lindesay Parrott, *Americans Sieze 21 Banks in Japan and Oust Officials*, N.Y. TIMES., Oct. 1, 1945, p.1, col.8, *cont'd* at p.6 col.5. For a complete list of the financial institutions closed, see SCHIFFER, *supra* note 13, at 35 n.19.

99. These included the German Deutsche Bank and the Banque Franco-Japonaise, a Vichy controlled bank, *Id.* at p. 6, col. 5.

100. JUSTIN WILLIAMS, SR., JAPAN'S POLITICAL REVOLUTION UNDER MACARTHUR: A PARTICIPANT'S ACCOUNT 6 (1979).

101. *McArthur Extends Curbs on Finance*, N.Y.TIMES., Oct. 4, 1945, p. 8, col.3.

correspondent banks and branches located abroad.[102]With one swift act, remaining international operations of Japanese banks ended.

Most of the seized banks were simply liquidated. The YSB, however, presented a more complex concern. Complicity in the war effort was clear. During the conflict, the bank became an active participant, advancing the government interests. Foreign branches "operated under the direct control of the local military administration . . ."[103] Moreover, the bank had, in the words of occupation officials, "become the principal instrument in the Government's complicated system of currency manipulation in occupied countries."[104]

The bank's international operations, however, played a unique role in the financial system. The YSB had an extensive overseas network, with branches in Asia, Europe and the United States. No other Japanese bank had anything comparable. Moreover, unlike the other special banks closed by SCAP, the YSB had a significant domestic presence. The Japanese government, therefore, lobbied hard to save the bank.

The circumstances surrounding the attempted closing of the YSB illustrated the often successful tactics used by the MoF to ameliorate occupation policies designed to restructure the financial system. Often unhappy with approaches developed by SCAP, MoF first tried to delay implementation. Officials usually engaged in a lengthy debate over the practicality of a particular policy. They sometimes asserted that various legal and other barriers prevented execution. Either way they bought time. Gradually, SCAP abandoned the offensive policy or, in the case of the YSB, accepted cosmetic changes.[105]

At the behest of the Japanese government, SCAP temporarily exempted the YSB from the mandatory closings. Thereafter, what to do with the YSB caused much bureaucratic teeth gnashing, something that caught the attention of the State Department.[106] On the one hand, occupation officers were committed to the elimination of all special banks. On the other, they were concerned about the impact on the economy of any untoward activity.[107]

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102. *MacArthur Extends Curbs on Finance*, N.Y. TIMES., Oct. 4, 1945, p. 8, col.3. Most of the occupied financial institutions never reopened.

103. Monograph No. 39, *supra* note 84, at 4. Although not a government bank, the YSB had played an important official role during the war, handling many of the BoJ's functions in the occupied territories, *see* BANYAI, *supra* note 66, at 8; *see also* PEPPER, *supra* note 68, at 147 n.7.

104. The currency manipulations in part enabled the Japanese to fund the cost of the military occupation.

105. In general, SCAP in the financial area tried to convince rather than impose. Interview with Sherwood Fine, Head of Finance Division, SCAP (Nov. 1991). This provided considerable room for negotiation.

106. *See* Incoming Message From War Dept., to CINCFE, NR W 86092, Sept. 12, 1947. SCAP Records, Suitland, Md. ("State Dept. Inquires Re: Status Yokohama Special Bank Report Requested").

107. SCAP officials from the Finance Division wanted to eliminate the final vestiges of

MoF ultimately prevailed. The MoF submitted a liquidation plan for the YSB in April 1946 that called for the transfer of YSB assets to a new financial institution. SCAP modified the plan by imposing a number of cosmetic steps, including the requirement that the resulting bank operate under a new name bearing no resemblance to the YSB.[108] SCAP also prohibited certain YSB officials from associating with the new institution.[109]

The modified reorganization plan effectively preserved the domestic assets of the YSB, but in a newly formed entity.[110] The Bank of Tokyo (BoT) emerged from the reorganization as an ordinary commercial bank.[111] The BoT, however, still had the most significant international experience of any Japanese bank. When the banks returned abroad, the BoT would be at the forefront, acting as the country's principal international agent.[112]

Occupation officials, however, made certain that the BoT had no monopoly over foreign operations by carefully preserving the right of other banks to engage in overseas activities.[113] Moreover, personnel of the defunct YSB had scattered among the other banks, ultimately becoming the nucleus of their international departments. Nevertheless, through the 1970s, the BoT remained the top Japanese international bank, receiving preferential treatment from MoF in the realm of oversees expansion.

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the special banking system that existed prior to the war. *See* Memorandum from Walter K. LeCount, Chief, Finance Division to Chief, Economic and Scientific Section, SCAP Records, Suitland, Md. (July 28, 1948) ("It is agreed that the special bank system should be eliminated at the earliest practicable opportunity. . . . This can be accomplished by each of the now existing special banks [reorganizing as ordinary commercial or debenture-issuing banks]."). Moreover, allied officials did so only after determining that reorganization would have little harmful effect on the financial markets. *Id.* ("It is not contemplated that this program if undertaken will have an appreciable effect on the total amount of credit available.").

108. *See* Dissolution Plan for Yokohama Specie Bank, SCAPIN 1049 (July 2, 1946), MacArthur Museum, Norfolk, Va. ("The name of the new institution will bear no similarity either in Japanese or in foreign translation, to that of the Yokohama Specie Bank.").

109. *See* Monograph No. 39, *supra* note 84, at 16 (noting that directors and executive officers of new bank could not be persons associated in similar capacities with YSB since 7 July 1937 or subject to purge).

110. Completion of the liquidation of the YSB apparently did not occur until 1949. *See* Dissolution Plan for the Yokohama Specie Bank, SCAPIN 1049/1 MacArthur Museum, Norfolk, Va. (June 28, 1949) (terminating "Trust Relationship" between YSB and BoJ).

111. Monograph No. 39, *supra* note 84, at 18. The BoT opened on Jan. 4, 1947. *Id.* According to Tristan Beplat, the government submitted a whole list of names, with BoT ultimately selected.

112. *See* discussion *infra* text accompanying note 211.

113. *See* Letter from W.F. Marquat, Chief, Economic and Scientific Section, to W.J. Sebald, Chief, Diplomatic Section, (undated), SCAP Records, Suitland, Md. ("The Yokohama Specie Bank, Ltd., which had monopolized the Japanese Foreign Exchange Business, had been placed in liquidation prior to the reorganization of the other Special Banks. To avoid further monopolistic controls by any one institution, plans were made at that time whereby all Japanese banks properly staffed with foreign exchange specialists would take over would take over the foreign exchange functions at such time as SCAP would authorize the reopening of the foreign exchange business.").

III. FROM PUNISHMENT TO PRESERVATION

A. *Firm Financial Footing*

Early policies focussed on closing banks and purging officials. By the middle of 1946 SCAP underwent a pronounced shift in approach. Punitive oriented reform shifted to preservation. The banking sector had emerged from the war in a precarious state.[114] Without a more benevolent approach, instability in the financial system likely would impede economic recovery.

Bank balance sheets brimmed with worthless assets. Following the end of the war, they had incurred "the loss of overseas assets, the losses arising from insurance cancellation on fire and bomb-damaged plants, and attendant losses following the Japanese surrender."[115] Lavish loans to munitions and other "essential" industries during the war remained unpaid. The banks also held debentures issued by the Wartime Finance Bank, a lender of last resort for military oriented businesses, with repayment guaranteed by the government.[116]

The government had agreed to indemnify the banks in the event of default. By the war's end, claims reached Y25 billion.[117] Payment, however, would have resulted in economic disaster. Resorting to the printing presses to create yen needed for repayment threatened to stoke already high inflation. Payment also had an unsavory flavor, giving the appearance of rewarding those banks that had financed the war effort.[118]

To put the banks on a more sound financial footing, occupation officials wanted to eliminate the indemnification payments. The Japanese government fought the proposal. Non-payment appeared to renege on prior commitments.[119] Tanzen Ishibshi, the Finance Minister, opposed the plan, particularly when occupation officials insisted that cancellation be at Japanese initiative. His efforts irritated SCAP and contributed to the decision to have him purged later that year.[120]

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114. R. FEAREY, THE OCCUPATION OF JAPAN SECOND PHASE 1948-50, 67 (1950) ("These [zaibatsu] Banks, with a total of about 800 branches through-out Japan, have not been broken up, mainly because of the injury to the stabilization and recovery programs which their dissolution would have entailed.").

115. *See* Letter from W.F. Marquat, Chief, Economic and Scientific Section to the Hon. W.J. Sebald, Chief, Diplomatic Section, SCAP Records, Suitland, Md. (undated).

116. ALLEN, *supra* note 23, at 63.

117. Monograph No. 39, *supra* note 84, at 20. Others put the figure at three times that amount. *See* Memorandum from R. Fearey, Division of Japanese Affairs, to H. Borton, Division of Japanese Affairs, Oct. 14, 1946, *reprinted in* THE FINANCIAL HISTORY OF JAPAN, *supra* note 82, at 689 ("The Japanese Government had obligated itself by July, 1946 to indemnify individuals and corporations for various types of war losses to a total of 75 billion yen.").

118. *See, e.g.*, Memorandum to H. Borton, *supra* note 117, at 689-90.

119. Opposition arose out of both a desire to make good on prior commitments and a desire to continue to pump money into the economy. *See* TSUTSUI, *supra* note 65, at 28.

120. Interview with Takeshi Watanabe, Former Chief, Liaison Office, Ministry of Finance, Tokyo (Mar. 1992).

MacArthur and his staff remained adamant about cancellation of the indemnity payments. As a compromise, occupation officials allowed the guarantees to remain in place but imposed a 100 percent tax on amounts paid.[121] The net effect was to render the indemnification payments worthless.[122] With the stroke of a pen, the assets of most banks evaporated. That left the problem of repaying depositors.

SCAP solved the concern by essentially confiscating deposits. Prior to indemnity tax implementation, SCAP officials froze yen deposits in excess of a family allotment,[123] affecting approximately forty percent of all deposits.[124] The deposits were used to offset elimination of the indemnity payments.

The Law for the Reconstruction and Reorganization of Financial Institutions in October 1946[125] required banks to accurately value assets and to submit to the government a reorganization plan.[126] Banks had to write off loans made to insolvent companies and worthless overseas investments but could deduct the losses from profits, capital, frozen deposits and, if necessary, free deposits.[127] Thus, banks expunged assets and eliminated comparable liabilities, emerging as much smaller but sounder.

With the balance sheets relatively clean, the banks were now in a better position to contribute to the country's economic recovery. As part of the reorganization and a symbolic break with the wartime era, most changed their names.[128] While some took back their original appellation after the occupation, Daiwa[129] and Fuji[130] did not.[131]

B. *Deconcentration*

With banks on a firmer financial footing, and the problem of special bank taken care of, SCAP turned to the matter of competition. The de-

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121. *See* War Indemnity Special Measures Law, Law No. 38 of 1946; *see also* Monograph No. 39, *supra* note 84, at 20.

122. Not completely, however. Because of exemptions from the tax, Y18 billion was in fact paid as indemnities. *See* FUJI, *supra* note 21, at 191.

123. Withdrawals from the accounts had essentially been blocked since issuance of the Emergency Financial Measures Ordinance in February 1946. Under the Ordinance small amounts could be withdrawn each month.

124. *See* TSUTSUI, *supra* note 64, at 30.

125. Law for the Reconstruction and Reorganization of Financial Institutions, Law No. 39 of Oct. 1946.

126. *Id.* art. 39.

127. Only a handful of banks needed to dip into free deposits. Rather than let this occur, the government paid these amounts. *See* Letter from W. F. Marquat, *supra* note 117. ("A government indemnity was given to those banks unable to absorb the final loss by 100% reduction of the capital account and the old account deposits, the amount of the indemnity being based upon the difference between the total asset loss and the total capital account and deposit reduction."); *see also* FUJI, *supra* note 21, at 191-92.

128. Mitsubishi for example became Chiyoda Bank.

129. Known as Nomura Bank before the war.

130. Known as Yasuda Bank before the war.

131. PEPPER, *supra* note 68, at 147 n.6.

struction of the Zaibatsu left the core Japanese banks largely unaffected. While some had changed their names and had high ranking officials purged,[132] the banks largely remained outside the early restructuring of the economy, despite obvious levels of concentration.[133] To some degree, they even received preferential treatment. This could be seen most clearly with the adoption and execution of the two laws designed to promote competition: The Anti-Monopoly Law and the Deconcentration Law.

The Law Concerning the Prohibition of Private Monopolies and Methods of Preserving Fair Trade of 1947, or the Anti-Monopoly Law, attempted to ensure competition among Japanese companies.[134] To prevent recurrence of the Zaibatsu, the enactment barred corporations from owning shares of one another, essentially outlawing holding companies.[135] The law also imposed a number of specific restraints on banks, including a prohibition on interlocking directors.

In general, however, banks received less onerous treatment than other industries. Exempted from the prohibition on stock purchases, they could own up to five percent of the shares of other companies, although not financial institutions.[136] The ability to acquire the shares solidified relationships with Japanese companies and facilitated the rise, of the kieretsu system.[137] According to at least one SCAP official, this result was not foreseen.[138]

The first case brought under the Anti-Monopoly Law was against financial institutions. On December 22, 1947, the Commission ordered twenty seven financial institutions in the Tokyo area to "abolish the

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132. *See* Law for Termination of Zaibatsu Family Control, Law No. 2 of Jan. 7, 1948; *see also* Monograph No. 39, *supra* note 84, at 23 ("Under this law all bank officials were screened and if they had exerted controlling power on behalf of the Zaibatsu's interest, they were removed from office and barred from key positions for ten years.").

133. The six largest banks, including the four Zaibatsu banks, made 30 percent of all commercial loans by private banks. *See* ORIENTAL ECONOMIST, Oct. 30, 1948.

134. Law Concerning the Prohibition of Private Monopolies and Methods of Preserving Fair Trade, Law No. 54 of Apr. 12, 1947.

135. Originally, the Law banned corporate ownership of shares entirely, excepting only banks. This harsh and unworkable requirement ultimately had to be modified. ADAMS & HOSHII, *supra* note 66, at 25. The law was amended in 1949 to do away with the prohibition on intercorporate stockholdings. *See* The Anti-trust Monopoly Law, Law No. 214 of June 18, 1949. *See also* HADLEY, *supra* note 85, at 198.

136. *See* Article 11 of the Anti-Monopoly Law, Law No. 214 of 1947 ("Any company whose business is financial shall not own stocks in a company with which it is competing and which operates in the same field of financial business. No company whose business is financial and whose total assets (excluding unpaid-up capital stock, unpaid-up partnership share or claims rights) exceed five million (5,000,000) yen shall acquire stock of another company in case, by doing so, it holds in excess of five percent (5%) of the total issued stock of said company."), *reprinted in* YAMAMURA, *supra* note 58, at 204-205. The percentage was later increased to ten percent, *id*, and returned to five percent in the 1970s.

137. The decision to permit bank ownership of shares in non-financial companies has been criticized. *See* HADLEY *supra* note 85, at 187 ("The toleration of bank holdings in industrial, commercial, and mining companies was unfortunate, . . .").

138. Beplat interview, *supra* note 85.

agreement on interest rates," a practice that had been going on since before the war.[139] At least with respect to deposits, control over rates transferred to the government with the adoption of the Temporary Interest Rate Law.[140]

Preferential treatment for Japanese banks became more clear, however, with the implementation of the Law for the Elimination of Excessive Concentration of Economic Power, better known as the Deconcentration Law.[141] The law slated the largest Japanese firms for break-up.[142] Administration of the law ultimately fell to the Holding Company Liquidation Commission (HCLC).[143] Although covered by the explicit terms of the Act, banks were in practice exempted.

The treatment of the banks under the Law was brought to MacArthur's attention in late 1947. In addition to other objections, Prime Minister Katayama requested that MacArthur exempt banks.[144] Although reassuring the Prime Minister about the affects of the law, MacArthur refused the request.

> [s]ince a blanket exemption of such [banking] institutions from the dissolution program manifestly could be construed as tantamount to preserving one of the major influences from which stemmed the prewar monopolistic and militaristic controls, the adoption of your recommended procedure is inadvisable. The impact of reorganization upon economic recovery is to be a primary consideration in the reorganization planning for each institution, including financial, and therefore there should result no serious interference with normal financing methods. Further, wholly owned government institutions are not to be included in the deconcentration program.[145]

The General had spoken, the issue was closed. The Deconcentration Law would not exempt banks. MacArthur confirmed the position in a radio message to the Department of the Army the following January.[146]

With the Law in place, SCAP officials discussed what to do with the banks. Considerable sentiment within SCAP supported the break-up of the large banks. Only sixty one commercial banks remained after the war. Even more concentrated than the statistic indicated, seven banks, includ-

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139. Shunsaku Nishikawa, *The Banking System: Competition and Control*, JAPANESE ECON. STUD. 3 (Spring 1974). The agreement involved the determination of maximum rates paid to depositors and charged to borrowers.

140. The Diet adopted the law in direct response to the case. *Id.*

141. Law for the Elimination of Excessive Concentration of Economic Power, Law No. 207 of Dec. 18, 1947.

142. For a copy of the law, see THE FINANCIAL HISTORY OF JAPAN, *supra* note 81, 6-30, at 386.

143. *Supra* note 142.

144. Letter from Tetsu Katayama to Douglas MacArthur, SCAP Records, Suitland, Md. (Sept. 4, 1947).

145. Letter from Douglas MacArthur to Prime Minister Tetsu Katayama, SCAP Records, Suitland, Md. (Sept. 10, 1947).

146. HADLEY, *supra* note 85, at 163.

ing those from the defunct Zaibatsu, controlled the vast majority of banking business.

One proposal was to divide the country into three regions (Tokyo, Osaka and Northern Japan) with prohibitions on bank expansion into more than one area. The approach amounted to an import from Germany, where the country had been divided into three separate regions. As military officials went from Germany to Japan, they brought their occupation experiences with them.[147] Other proposals were more blunt. They simply wanted the larger banks dismantled. One called for the subdivision of the banks into "no less than two and no more than three separate, independent banks."[148]

None of these proposals ever saw the light of day. A fierce bureaucratic struggle occurred within SCAP over the proper treatment of Japanese banks under the Deconcentration Law. In general, the Antitrust and Cartels Division wanted to divide the Japanese banks, something vigorously opposed by the Finance Division. Welsh, Chief of the Antitrust and Cartels Division, constantly reminded General Marquat, head of the Economic and Scientific Section, of his obligations to subject banks to review under the Deconcentration Law.[149] To Welsh and others in the Antitrust Division, concentration threatened to handicap the nascent development of democracy.[150]

Welsh, however, ultimately lost, with Marquat siding with the Finance Division.[151] The General opposed the break-up and favored proposals designed to exempt them from the auspices of the HCLC.[152] The decision arose out of SCAP's fears over the continued solvency of financial

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147. Beplat interview, *supra* note 85.

148. HAMM, DECONCENTRATION OF ECONOMIC POWER. JCS 1380/15, paras 13, 13a, 35a, *quoted in* COHEN, *supra* note 80, at 24.

149. *See, e.g.*, Memorandum from Edward C. Welsh, Chief, Antitrust and Cartels Division to Chief, Economic and Scientific Section, SCAP Records, Suitland, Md. (Apr. 26, 1948) ("SCAP is operating under basic directives (ref. JCS 1380-15, FEC 014, FEC 015) which state: 'You will require plans for dissolving large Japanese industrial and banking combines . . . . (and) . . . . you will establish and maintain surveillance, until satisfactory plans for reorganization have been approved over (such) Japanese businesses.' ").

150. Conversation with Eleanor Hadley, Former Official, Antitrust and Cartels Division, ESS (June 26, 1991). She indicated that some within SCAP had the fear that high concentrations of wealth would impede the development of democracy.

151. Some have criticized the division of authority over banks between the two Sections. *See id.* at 72.

152. *See* Memorandum for the Record, Economic and Scientific Section, SCAP Records, Suitland, Md. (Apr. 18, 1948) ("The General [Marquat] stated that necessary steps should be taken to dissolve such concentrations of power but that this did not necessarily require a breaking up of the banks themselves. He said that the operating structure should be looked into on this basis. He further stated that such action should be taken immediately to clarify the bank situation so that an announcement may be made in the near future to the effect that banks designated under the deconcentration law have been divested of any excessive concentration of financial control and were no longer subject to the provisions of the act.").

institutions.[153] As one SCAP document noted:

> Breaking up these banks [Yasuda, Teikoku, Mitsubishi, Sanwa and Sumitomo] would be almost certain to cause a loss of public confidence. Division of these banks would produce a group of smaller banks, the deposits in each of which would be insufficient to serve adequately the loan requirements of large borrowers. The ratio of money on deposit to money in circulation is already low. Breaking up these banks would further aggravate this condition. Moreover, each of these banks is now under-capitalized and is faced with the necessity of raising additional equity capital. A break-up would increase the difficulties of attracting this capital.[154]

With these concerns in mind, SCAP announced that banks would be exempt from application of the Deconcentration Law.[155] To pay lip service to the legislation, however, allied officials required banks to take steps to eliminate "those characteristics which tend to classify them as excessive concentrations of power."[156] In practice, however, that amounted to little.

The exemption from the Deconcentration Law did not go unnoticed. The banking sector remained highly concentrated, generating criticism.[157] The criticism engendered an almost defensive tone from SCAP officials.

> [I]t must be pointed out and emphasized that the development of large banks, (as well as small banks) based on sound banking principles and appropriate controls, is most essential in any modern economy. The objective is not to limit the development of properly managed institutions — be they large or small. The aim since the inception of the bank reorganization program has been the elimination of malpractices of all banks. The concept that an institution is evil merely because it is large is rejected. As an economy expands — as the tempo of recovery is speeded up with the accompanying increase in the size and activity of its component parts, it is necessary, normal and desirable that financial institutions serving that economy

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153. HADLEY, *supra* note 85, at 242.

154. Memorandum from Roy S. Campbell, Deconcentration Review Board to SCAP (July 2, 1948), SCAP, *reprinted in* THE FINANCIAL HISTORY OF JAPAN *supra* note 81, 6-37, at 403.

155. YAMAMURA, *supra* note 58 ("In July, 1948, SCAP announced that the former Zaibatsu banks would be excluded from Law 207 [the Deconcentration Law], since, as SCAP stated, these banks had been divorced from the holding companies and were then in the purview of the Anti-Monopoly Act.").

156. Memorandum from W. F. Marquat, Chief, Economic and Scientific Section, for E. C. Welsh, Chief, Antitrust and Cartels Division (May 7, 1948), SCAP Records, Suitland, Md. The memorandum further required that "the banking institutions will submit plans for accomplishment of the above objectives, upon acceptance of which they will be free to continue operation without being subject to further reorganization under provisions of the deconcentration law." *Id.*

157. *See* Memorandum from W.F. Marquat, Chief, Economic and Scientific Section of SCAP, SCAP Records, Suitland, Md. (Mar. 4, 1950) ("[That] Japan had 71 ordinary banks having deposits of Y 705,564 million (Jan. 1950) of which ten banks controlled approximately 63 percent, as of 1 February 1950, would appear to compare favorably with respect to both a dispersion of economic power and fair inter-bank competition.").

> should correspondingly develop in size and ability to serve the expanded requirements.[158]

Despite the controversy, SCAP never seriously reconsidered the position.[159] The big banks remained big.

IV. COMPARTMENTALIZATION

The fight over application of the Deconcentration Law was not the last word. Even those officials opposing breakup remained committed to increased competition. With only a small number of commercial banks, something had to be done.[160] The Finance Division within SCAP made the deliberate decision to lessen the influence of the small number of big banks by encouraging the recovery of a handful of additional financial institutions and by creating new classes of competitors.

Increased competition had a number of justifications. Despite the success in saving banks from the Deconcentration Law, SCAP officials were quite aware that a small number of large banks was prone to government manipulation. Competition also promised to ensure a more equitable distribution of loans. Despite elimination of the Zaibatsu, banks continued to favor preexisting clients and former members of the industrial groups.

By creating a new class of competitors, SCAP hoped to provide a source of lending not beholden to these relationships. Unlike the pre-war Zaibatsu banks, the new classes would have no preexisting business relationships. Those borrowers not in a Zaibatsu could therefore turn to the new banks for credit. This was particularly important given the difficulties confronted by small businesses obtaining loans.[161]

Increased competition was also expected to benefit the city banks. With other sources of capital, the multitude of companies from a former Zaibatsu no longer had to look exclusively to the group's lead bank for

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158. Letter from W.F. Marquat, Chief, Economic and Scientific Section to the Hon. W.J. Sebald, Chief, Diplomatic Section, SCAP Records, Suitland, Md. (undated).

159. *See* Memorandum from W.F. Marquat, Chief, Economic and Scientific Section, SCAP Records, Suitland, Md. (Mar. 4, 1950) ("Reference is made to an article contained in the Nippon Times of 2 March 1950 (copy attached) in which it was reported that, at the 108th meeting of the Allied Council, the British Commonwealth member made the following statements: (a) that his Mission has information that eight of Japan's banks 'control 80% of the industrial and economic life of this country.' (b) that SCAP 'may have' dissolved the Zaibatsu but (he asked) whether if (destroying one evil) another one - the bank's - had been established.").

160. *See* Monograph No. 39, *supra* note 84, at 30 (noting that in 1949, the ten largest banks were Fuji, formerly Yasuda (186 branches); Teikoku (100 branches); Dai-Ichi (81 branches); Bank of Tokyo (39 branches); Chiyoda, formerly known as Mitsubishi (158 branches); Tokai (205 branches); Daiwa, formerly known as Nomura (101 branches); Sanwa (194 branches); Osaka, formerly known as Sumitomo (159 branches); and Kobe (166 branches).

161. *See, e.g.*, Memo from R. E. Phillips, Credit Policy Unit, Finance Division, ESS, Re: Foreign Trade Financing, SCAP Records, Suitland, Md. (Oct. 9, 1947).

financing. Not representing the exclusive source of financing for all of the companies within the industrial complex, city banks could concentrate on particular industries and particular lenders.[162]

Simply creating additional financial institutions was not, however, enough. The size and dominance of the city banks meant that new entities could be easily elbowed aside. SCAP, therefore, embarked on a deliberate policy of compartmentalizing the banking system. This essentially involved the walling off of different areas from encroachment by the city banks. Under the tutelage of SCAP, city banks found that they could not engage in securities activities, have trust departments, or sell debentures. Compartmentalization ensured survival; companies or banks performing these tasks did not have to fear absorption and domination by the large commercial banks.

The broad approach of creating new competitors had to overcome the stiff opposition within the MoF.[163] In general, MoF's goal was to oppose further concentration. Since the 1920s, MoF had been engineering a reduction in the number of banks. Ultimately, however, the MoF accepted compartmentalization, in part because the practice enhanced bureaucratic authority.

The first public statement promoting an increase in the number of competitors apparently emerged from the report of the Edwards Mission. More formally labeled the State-War Mission on Japanese Combines, the group consisted of representatives of a handful of agencies and departments (and one law professor). They descended on Japan in 1946, primarily to study the Zaibatsu. Among other things, the Mission recommended that "the number of independent sources of credit should be increased substantially. . . ."[164] The only specific example provided in the report, however, was divestiture of banks forcibly amalgamated by the government and the division of the largest banks.

ESS accepted the recommendation but not the method of implementation. Instead of downsizing existing banks, SCAP favored the creation of new classes of financial institutions. Occupation officials, therefore, continuously looked for ways to increase the number of participants in the financial sector. Conversion of savings into commercial banks and the expansion of the number of regional banks all facilitated competition.[165]

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162. *See* Letter from W.F. Marquat, Chief, Economic and Scientific Section to the Hon. W.J. Sebald, Chief, Diplomatic Section (undated). SCAP Records, Suitland, Md. ("The increase of the number of independent sources of credit has broadened the borrower's choice of selection among the lending institutions. This has made it possible for the large banks, including the former Zaibatsu banks, to better serve basic industries through being relieved of the necessity of servicing the numerous industrial affiliates formerly controlled by Zaibatsu interest.").

163. Beplat interview, *supra* note 85.

164. *See Policy on Excessive Concentrations of Economic Power in Japan, Report of the Mission on Japanese Combines*, May 12, 1947, *reprinted in* THE FINANCIAL HISTORY OF JAPAN, *supra* note 81, at 350, 355.

165. Letter from W.F. Marquat, Chief, Economic and Scientific Section to the Hon.

Teikoku Bank, formed through an amalgamation of Mitsui and Dai-Ichi Bank in 1943, dissolved in October 1948, generating two additional financial institutions.[166]

International operations represented another area affected by SCAP's pro-competition policy. Elimination of the Yokohama Specie Bank paved the way for other Japanese banks into the international arena. SCAP, however, went to great lengths to ensure that the newly formed BoT and small handful of city banks did not obtain a stranglehold over international activities.[167]

The Japanese government divided banks into two classes. Class A banks could engage directly in international activities by entering into correspondent bank relations and opening accounts with foreign financial institutions. Class B banks, in contrast, had to operate through those in Class A.[168] The classification, therefore, amounted to a limitation on the scope of international activities.

MoF initially attempted to limit those in Class A to eight city banks, five from the defunct Zaibatsu. SCAP, however, would have none of that. Designation of Japanese financial institutions as foreign exchange banks required SCAP approval, providing considerable leverage.[169] To address the concerns, MoF added four other banks to the list.[170] Occupation officials also contemplated that, as Class B banks obtained international expertise, they would move to Class A.[171]

Trust activities represented another area compartmentalized as a result of efforts by SCAP. In the aftermath of the war, trust companies had largely seen their business evaporate and their assets become worthless.[172]

W.J. Sebald, Chief, Diplomatic Section, (undated). SCAP Records, Suitland, Md.

166. HADLEY, *supra* note 85, at 119.

167. *See, e.g.*, Memorandum attached to letter from W. F. Marquat, Chief, Economic and Scientific Section, to The Honorable W. J. Seabald (undated). SCAP Records, Suitland, Md. ("The Yokohama Specie Bank, Ltd., which had monopolized the Japanese foreign exchange business, had been placed in liquidation prior to the reorganization of the other Special Banks. To avoid further monopolistic controls by any one institution, plans were made at that time whereby all banks properly staffed with foreign exchange specialists would take over the foreign exchange functions at such time as SCAP would authorize the reopening of foreign exchange business.").

168. KEN BIEDA, THE STRUCTURE AND OPERATION OF THE JAPANESE ECONOMY 147 (1970).

169. *See, e.g.*, Memorandum from Chief of Fund Section, Account Bureau, Board of Trade to Mr. Cleveland, Fund Control Division, ESS, GHQ, SCAP, BOTA # 8825-II-25, SCAP Records, Suitland, Md. (Aug. 17, 1948) (requesting approval for designation of Hokkaido Colonial Bank as foreign exchange bank).

170. Bank of Kobe, Daiwa Bank, Tokai Bank and Nippon Kangyo Bank were all added at the behest of SCAP officials, THE OCCUPATION OF JAPAN, *supra* note 90, at 238. Trust banks and a number of regional banks were also encouraged by SCAP to become Class B foreign-exchange banks. *Id.* at 234 n.48.

171. This amounted to another example of wishful thinking. Once the occupation ended, international expansion remained a monopoly of the Bank of Tokyo and a small number of city banks, much the way it had been before the war.

172. *See* Monograph No. 39, *supra* note 84, at 23 ("A large part of their portfolios consisted of securities issued by closed institutions, restricted corporations and special ac-

Post-war inflation and a prohibition on securities activities further eviscerated their business.[173] The companies also suffered from the entry of commercial banks into the trust business during the war.

To ensure solvency, SCAP wanted MoF to increase the powers of the trust companies by allowing them to engage in banking activities.[174] SCAP officials ran into a brick wall, with MoF resisting the entreaties. The MoF wanted the large city banks to absorb the trust companies, eliminating them as a separate class of institutions.[175] The Banking Bureau stonewalled, claiming that legislative changes by the Diet were necessary to implement the plan.[176]

With an impending change of personnel at SCAP, however, the Ministry had a change of heart. The replacement might not be so accommodating or might insist on unacceptable terms. The Director General of the Banking Bureau suddenly announced that in fact, MoF had the administrative authority to extend banking powers to trust companies. With a wave of the wand, the SCAP reforms were implemented and trust companies received banking powers.[177] Six of seven trust companies reorganized as banks with one opting to become a securities firm.[178]

Acceding banking powers to trust companies did not guarantee survival. The possibility that city banks would dominate the trust area still remained a concern. Occupation officials encouraged MoF to force commercial banks out of the trust business.[179] Furthermore, at SCAP's insistence, trust banks received the authority to issue long term loans. Companies flocked to the new banks in search of financing.

Finally, the separation of banking and securities functions further illustrated to the compartmentalization process. Adopted during the occupation, Section 65 of the Securities and Exchange Law prohibited banks from selling stocks, bonds and other securities. The separation represented an oddity with broad consequences.

Unable to sell corporate stock or debt, banks lost an obvious revenue source. That in turn solidified dependence upon the BoJ as a source of

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counting companies and the utilization of these securities was for all practical purposes impossible.").

173. *See* Monograph No. 39, *supra* note 84, at 26. The prohibition was contained in the Securities Transaction Law of 1948. ADAMS & HOSHII, *supra* note 66, at 109.

174. Beplat, *supra* note 85, at 239.

175. Beplat interview, *supra* note 85.

176. B.C. KOH, JAPAN'S ADMINISTRATIVE ELITE 208 (1989).

177. Beplat interview, *supra* note 85.

178. Sumitomo (Fuji Bank and Trust Co., Aug. 2, 1948); Mitsui (Toyo Bank and Trust Co., Aug. 2, 1948); Mitsubishi (Asahi Bank and Trust Co., Aug. 2, 1948); Yasuda (Chuo Bank and Trust Co., Aug. 2, 1948); Dai-Ichi (Dai-Ichi Bank and Trust Co., July 12, 1948); and Nippon (Nippon Bank and Trust Co., July 12, 1948).

179. *See* FEDERATION OF BANKERS ASSOCIATION, *supra* note 18, at 15, ("After the war, however, the GHQ and the Ministry of Finance intervened with the policy that once again separated banking and trust businesses.").

funds.[180] The separation also deprived financial institutions of any incentive to encourage companies to pursue alternative capital sources such as the sale of stock. The elimination of banks from the securities markets retarded development of the stock market and contributed to an immense concentration in the brokerage community.[181]

The separation, at first blush, seemed to have an ethnocentric explanation. The United States had in place a comparable requirement. Congress separated securities and banking functions in 1933, having concluded that the Great Depression resulted at least in part from risky securities ventures by banks. In fact, however, article 65 arose not out of a desire to replicate the extent regulatory system in the United States, but to increase competition.[182] Prohibiting banks from engaging in securities activities guaranteed that an independent class of brokers firms would emerge. The plan worked with unparalleled success. By the 1970s, brokers had become so successful that they rivaled commercial banks in financial and political power, generating considerable conflict.

Occupation officials also approved the division of banks on the basis of short term and long term lending capacity, although only after a number of embarrassing shifts in policy. The three pre-war debenture issuing banks, Hypothec Bank, Hokkaido Colonial Bank, and the Industrial Bank of Japan (IBJ), were initially slated for closing.[183] SCAP had little interest in preserving the special authority of these institutions. Debenture issuing banks designed primarily to provide long term financing also seemed unnecessary. Occupation officials expected an invigorated stock market to eliminate the need for a special class of banks designed to more long term loans.[184]

After some thought and government opposition, SCAP decided against liquidation. Upon "mutual agreement," SCAP gave the banks the

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180. Depriving banks of authority to underwrite was also consistent with the separation of long and short term financing. Permitting involvement in the sale of corporate securities would have resulted in the anomalous situations of commercial banks prohibited form making long term loans but permitted to facilitate long-term financing through the sale of corporate stocks and bonds.

181. Four brokerage firms ultimately monopolized the market: Nomura, Daiwa, Nikko and Yamaichi.

182. Beplat interview, *supra* note 85. *See also* FEDERATION OF BANKERS ASSOCIATION, *supra* note 18, at 16 ("The law was based on a desire to protect and strengthen Japanese securities companies, . . .").

183. *See* Memorandum from J.R. Allison, Director of Finance (acting), to Chief, Economic and Scientific Section, SCAP Records, Suitland, Md. (Mar. 29, 1950) "the initial approach toward the debenture issuing banks from 1945 was directed toward necessary reforms to be applied to the Japanese banking structure - designed to eliminate malpractices and control devices. FEC 230, 12 May 1947, ¶ 12d states: 'the functions and powers of special banks should be defined and limited by law and these banks should not be allowed to engage in ordinary banking. The need for the existence of the special banks should be reviewed in order to determine whether certain of these banks might not revert to the status of ordinary banks.' ").

184. *See* Pressnell, *supra* note 38, at 204.

choice of reorganizing either as a long term or a commercial bank.[185] In 1948, the Hypothec and Hokkaido Colonial Bank converted to ordinary commercial banks while the IBJ opted for bond-issuing powers. Viewed as a transitory measure,[186] SCAP expected the IBJ to eventually convert to an ordinary commercial bank.[187]

When the stock market did not recover Japanese companies, desperate for capital, began to look increasingly to commercial banks. The weak state of Japanese industry made the loans unattractive. As MoF officials noted:

> Private financial institutions lately are showing a strong tendency to limit lending to relatively large enterprises in order to avoid troubles and risk in giving loans to petty business. Such a tendency can be seen even in small-scale local banks. In spite of the fact that our country's industrial structure is founded largely on the basis of small and medium height and size enterprises and farming, forestry and fishing industries also are operating, in the main, on a small scale, and most of them are worthy of continued existence, they have been neglected by financial institutions and been suffering from shortage of money.[188]

For banks to provide capital in necessary quantities, two things had to occur: they needed funds beyond what could be generated through deposits and they needed increases assurances of repayment.

To alleviate the risk and encourage lending, the BoJ provided an implicit guarantee of repayment. To the extent funds went to appropriate companies, the central bank stood ready to repay in the event of default. Banks no longer had to worry about risks associated with an uncertain economy. These policies encouraged banks to step up lending activities.[189]

The next problem was funding. The deposit base proved inadequate.

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185. *See* Memorandum from Walter K. LeCount, *supra* note 87, (discussing options of special banks; to be given choice of reorganizing as ordinary commercial bank or as a debenture issuing corporation).

186. *Id.* ("Under the prevailing conditions of the debt issuing market, the idea also is considered inadvisable in relations to the supply of long-term industrial funds. For these reasons, it is believed advisable to adopt such transitory measures as will be enumerated below, so that the Industrial Bank may be allowed to bolster its functions as a deposit bank under certain restriction and at the same time authorized for the time being to issue its debenture.").

187. *See, e.g.*, Letter from H. Ichimada, Governor, Bank of Japan to General W.F. Marquat, Chief, Economic and Scientific Section, (July 16, 1948) SCAP Records, Suitland, Md. ("Although it is believed advisable for the Industrial Bank of Japan to develop itself into an ordinary bank in the future, considerable difficulties will have to be encountered in materializing such a plan all at once today in view of the present conditions of the same bank.").

188. JAPANESE MINISTRY OF FIN., ON SOME MEASURES FOR CORRECTING THE CURRENT TIGHTNESS IN MONEY MARKET, SCAP Records, Suitland, Md. (1948).

189. The over loan situation had also been a characteristic of the financial system in the early Meiji era. By the end of World War I, however, Japanese commercial banks were no longer dependent on loans from the BoJ. As one writer described, the banks viewed dependence on the central bank as "shameful." YOSHIO SUZUKI, MONEY AND BANKING IN CONTEMPORARY JAPAN 9 (1980).

SCAP knew about the shortage of yen and favored giving all commercial banks the authority to issue debentures.[190] Adopted in 1950, the Law Concerning Debenture Issues of Banks did exactly that.[191] The Law theoretically ended the pre-war distinction between short and long term banks. With the simultaneous abolishment of special banks,[192] Japan temporarily had "an undifferentiated system of commercial banks."[193]

The legislation did not work as expected. Although permitted to issue debentures, most commercial banks did not.[194] Moreover, dependent on deposits and other short term sources of funding, commercial banks were increasingly asked to absorb greater amounts of long-term debt.[195] This threatened to cause financial instability.

In response, SCAP shifted gears. Rather than leave long-term lending to the banking system as a whole, occupation officials opted for a class of banks specifically for that purpose.[196] Taking the steps required a somewhat embarrassing policy shift. After all, the decision essentially res-

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190. *See* Marquat Letter, *supra* note 113 ("The inception of this program [the Dodge line] brought into sharp focus the shortage of any urgent necessity for a most substantial volume of long-term credit. The generation of an increased long-term capital funds can most properly an expeditiously be implemented through full employment of bank debentures. Accordingly, legislation is currently before the Diet authorizing all banks to issue debentures up to 20 times capital.").

191. Most of the bonds were purchased by the BoJ. *See* SCHIFFER, *supra* note 13, at 75.

192. The adoption of the Law Abolishing the Hypothec Bank of Japan Law etc., in 1950 permanently ended the system of special banks. *See* Pressnell, *supra* note 38, at 48.

193. NAKAMURA, *supra* note 65, at 140.

194. *See* Pressnell, *supra* note 38, at 205 (noting that debentures were issued only by the Nippon Kangyo Bank, the Industrial Bank of Japan, the Hokkaido Takushoku Bank, the Central Co-operative Bank of Agriculture and Forestry, the Central Bank for Commercial and Industrial Co-operatives and the Bank of Tokyo). *See also* G.C. ALLEN, JAPAN'S ECONOMIC RECOVERY 44 (1958) ("It is true the legal distinction between those banks and the ordinary banks was destroyed in 1950 when all banks were given the right of issuing debentures within certain limits. In practice, however, the privilege was exercised only by three of the former Special Banks, and by them only because the government subscribed to there stocks and debentures form the United States Aid Counterpart Fund and from the Treasury Deposits Bureau.").

195. *See* Memorandum from Joseph M. Dodge to Major General W.F. Marquat, Re: Banking and Bank Credit - Private Debt - Capital Funds Availability, SCAP Records, Suitland, Md. (Nov. 29, 1950) ("The normal and establisher specialized banking mechanisms for supplying long-term credit (viz., Industrial Bank and others) largely had been eliminated and the banking system reduced solely to one of commercial banks, the latter had been forced to absorb a larger amount of long-term credit than their fundamental status should require.").

196. By the end of 1950, Dodge had come around to this view. *See* Memorandum from Joseph M. Dodge to Major General W. F. Marquat, Re: Industrial Financing, SCAP Records, Suitland, Md. (Dec. 3, 1950) ("I believe that it is generally agreed among the Japanese financial officials and authorities that there is a need in Japan for the Industrial Banks to resume its exclusive functions of industrial financing of a long-term nature . . . . I have told Mr. Ichimada, the head of the Industrial Bank, and Mr. Ikeda that if the idea of re-establishing this bank as exclusively a long-term loan bank is valid and the initiative for this move was to come from them rather than from us, I believe it might receive favorable consideration.").

urrected the carefully and deliberately eliminated "special banks."[197] Nevertheless, economic exigencies and Joseph Dodge compelled the return of long term banks.[198]

Under the auspices of SCAP, the Diet adopted the Long-Term Credit Banks Law in 1951. The law provided for a class of long term banks to provide capital needs of companies. Commercial banks simultaneously lost the power to issue debentures.[199] The IBJ predictably chose to organize as a long term bank. The IBJ had been acting in that capacity since the end of the war.

The other two pre-war banks with debenture issuing authority, the Nippon Kangyo Bank and Hokkaido Takushoku Bank, opted to remain ordinary commercial banks. They did, however, assist in the formation of, and contribute assets to, the Long-Term Credit Bank, with Nippon Kangyo Bank essentially contributing its investment banking operations. The Nippon Credit Bank, the last of the long term banks, emerged five years later out of the remnants of the Bank of Chosen to provide capital for smaller companies.[200]

V. THE AFTERMATH

The immediate post-occupation period saw a flurry of legislation ratifying existing division within the banking system. Tilting to reality, the government codified the de facto distinction between long term and commercial banks.[201] The Long-Term Credit Law of 1952 authorized designated banks to issue five year bonds and one year discounted debentures.[202] Only banks organized under the law could issue the debt.

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197. *See id.* ("If I am correctly informed, I believe the change of [the Industrial Bank of Japan's] functions from industrial financial banking was at least partially initiated by this headquarters. That places us in a somewhat embarrassing position of having to reverse a previous action, if this is to be done.").

198. Dodge, a Detroit banker, had been sent to Japan to devise a strategy for returning the country to a sound economic footing. The so called "Dodge Line" called for, among other things, a balanced budget, something that remained in place until the mid-1960s. *See generally* COHEN, *supra* note 80, at 431.

199. With city banks no longer having the authority to issue debentures, they were dependent for financing on deposits, loans from other banks and the government. The government did not let them down. The BoJ expanded credit to banks by 60%. COHEN *supra* note 80, at 438. As Cohen noted, without the overloans, "Japanese business would have been left gasping like fish washed up on the beach." *Id.*

200. YOSHIO SUZIKI, MONEY AND BANKING IN CONTEMPORARY JAPAN 102 (1980). In addition to government ownership of shares, capital for the bank came from assets of the liquidated Bank of Chosen. The Bank had a slightly different purpose than the other long term banks. "[T]he chief business of this bank is the supply of equipment funds and long-term working capital secured by mortgages to small enterprises." *Id.* at 104.

201. Extending debenture issuing powers to all banks simply did not work. The IBJ did issue debentures and make long term capital loans, much as it had before the war. Most other banks failed to take advantage of the authority. Only the Nippon Kangyo Bank, the IBJ, the Hokkaido Takushoku Bank, the BoT and a handful of specialized institutions issued debentures under the law. *See supra* note 200, at 128.

202. The BoT eventually received the authority in the 1960s to issue debentures with

Legislation in the immediate post-occupation period also confirmed the position of trust banks. With the revival of investment trusts (mutual funds), trust banks were allowed to act as trustee, a highly lucrative position.[203] More importantly, the Diet adopted the Loan Trust Law authorizing the banks to collect long term funds (two to five years) to make loans for a specified purpose.[204] Loan trust certificates resembled certificates of deposit, something city and regional banks could not issue for almost 30 years. MoF, of course, carefully controlled the loans, insuring proper direct flow to "critical industries,"[205] primarily shipping, electricity, coal, iron and steel.[206] By 1962, trust banks also received the authority to manage pension plan assets.[207]

The 1950s also saw completion of the process of separating trust and commercial banking activities, something begun during the occupation.[208] Four city and seven regional banks had continued to engage in trust activities.[209] Although "encouraging" commercial banks to divest their trust activities since 1954, the Banking Bureau within the MoF ordered complete separation by city banks only as the decade ended. By 1966, the last redoubts among regional banks disappeared.[210]

No legislation decreed the separation. Quite the contrary. City banks received express authority to engage in trust activities through legislation adopted during the war. That mattered little to MoF. Trust banks needed protection. Divestiture also tightened MoF's grip over the banking sector. Deprived of trust activities, commercial, particularly city, banks lost another source of revenue. This made them even more dependent upon lending activities and, concomitantly, borrowings from the BoJ.

The early post occupation years also saw the codification of the preeminent international position of the BoT. The Foreign Exchange Bank Law of 1954 provided for a specially designed foreign exchange bank, primarily for export financing. The law was adopted with the expectation that only the BoT would register. Having absorbed much of the staff of the YSB, the BoT presented the only Japanese bank with the expertise

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maturity of three years. For a brief discussion of debt issuing authority by long term banks, *see* TAKEDI YAMASHITA, JAPAN'S SECURITIES MARKETS, A PRACTICAL GUIDE 160 (1989).

203. The resurgence of the investment vehicles coincided with the adoption of the Securities Investment Trust Law in 1951.

204. Funds raised under the Loan Trust Law were deposited for a fixed period of time. With minimum deposit amounts of 10,000, the principal and interest of the deposits were guaranteed. *See* ADAMS & HOSHII, *supra* note 66, at 111.

205. *See* NAKAMURA, *supra* note 65, at 141. *See also* Pressnell *supra* note 38, at 225.

206. SUZUKI, *supra* note 200, at 114 (plan of trust property administration must be submitted to MoF for approval); *see also* Pressnell, at 226 (noting that at one time MoF had restricted loans to industries other than those five).

207. ADAMS & HOSHII, *supra* note 66, at 110.

208. Beplat interview, *supra* note 85; *See also* THE BANKING SYSTEM *supra* note 18, at 15 ("After the war, however, the GHQ and the MoF intervened with a policy that once again separated banking and trust businesses.").

209. THE BANKING SYSTEM, *supra* note 18, at 15.

210. *Id.*

and depth capable of handling extensive international activities.

By the early 1950s, the BoT had already begun spreading abroad. The bank had offices in New York, London, California, India and Pakistan.[211] Designation under the law ensured favorable treatment in opening overseas branches. The MoF also used the bank as an agent for various activities abroad. In committing to the international arena, however, BoT paid a price. Domestic operations were restricted with the bank forced to close all offices not related to trade finance.

VI. THE PRESENT

Despite some initial opposition, MoF came to agree with SCAP's vision of the banking system, although with a twist. While originally preferring increased consolidation, the MoF gradually recognized the value of a compartmentalized financial sector. The functional divisions gave each category of banks a particular niche in the financial system, something that appealed to MoF's sense of order.

Not coincidentally, compartmentalization also increased MoF's ability to control activities in the financial markets. City banks could not regain the size and influence of the old Zaibatsu banks, making them less capable of standing up to MoF influence. In addition, by dividing banks on the basis of funding, they became dependent upon the government largess, particularly the BoJ, for additional funds to lend.

MoF used the control to maintain order throughout the financial system. Relying upon "administrative guidance" or informal advice, the MoF insisted that banks pre-clear all major developments.[212] This gave MoF extraordinary power to control the course of events before they occurred, an opportunity MoF used with vigor. Most notably, MoF invoked guidance to force commercial banks out of the trust business notwithstanding express legal authority to emerge in the activity.

Banks followed MoF advice in part because they feared the consequences of not doing so. Primarily through the power to approve or disapprove the establishment of new branches, the MoF had the ability to limit the expansion of recalcitrant banks.[213] Daiwa Bank suffered exactly those consequences after refusing to follow Ministry guidance and divest

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211. Interview with Seishichi Itoh, Senior Managing Director, Bank of Tokyo, Tokyo (Mar. 1992).

212. In Japanese the phrase is *gyosei shido*. *See* Allan D. Smith, *The Japanese Foreign Exchange and Foreign Trade Control Law and Administrative Guidance: The Labyrinth and the Castle*, 16 LAW & POL'Y INT'L BUS. 417, 418 n. 6 (1984); *see also* Yoriaki Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45, 54 n. 13 (1968) ("Fundamentally, circulars are employed as a means of direction and supervisor over interior administrative structure, but they are also issued to inform juristic persons and associations outside the administrative structure as to definitive matters."). For a legal discussion of the subject, *see* Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 953 (1984).

213. *See* The Banking Law, *supra* note 31.

trust activities.[214]

The banks accepted the stifling degree of administrative control not only out of fear. A broad consensus existed within the banking community and society as a whole that government manipulation of the financial system to promote economic growth was acceptable. More to the point, banks flourished under the system.

In return for regulatory submissiveness, financial institutions received assured profitability. By restricting available alternative investment vehicles, individuals had little choice but to deposit surplus funds with banks. Controls on interest rates ensured depositors an anemic return. With loan demand kept high, particularly through restrictions on other types of corporate borrowing, and cost of funds low, Japanese banks had no difficulty turning a profit.[215] Even the risks associated with high levels of corporate borrowing were ameliorated by implicit repayment guarantees.[216]

Through the 1990s, little was done to alter this basic framework. Reforms occurred in each decade, but they amounted to mere refinements rather than wholesale revisions.[217] Compartmentalization seriously eroded only with the adoption of reforms in 1992 and only after MoF determined that segmentation no longer had the same benefits.

The more modern story of the decompartmentalization process warrants a story in and of itself. For one thing, the domestic process of achieving a consensus on the changes entailed an eight-year struggle that essentially involved a pitched conflict between banks and securities firms. Brokers rightfully feared that banks, with their close relationships to corporate Japan and extensive branch networks, would provide considerable competition for securities business.

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214. Daiwa's president refused to give up the trust activities, apparently feeling that they were too critical to the bank's future. The validity of his reasoning aside, the practical effect was that he resisted the guidance of the Ministry. Daiwa's approach was not well received. Future branch applications received a cold shoulder. Daiwa was also effectively excluded from the Loan Trust Law and appartenly had difficulties getting approval for branch licenses. The message was clear: ignore the Ministry's guidance at great peril.

215. The system also provided other advantages. As Chalmers Johnson has noted, emphasis on lending as the primary source of profits also imposed on banks considerable incentive to uncover growth companies that would provide new sources of loans. JOHNSON, *supra* note 87, at 206.

216. James C. Abbelgan & William V. Rapp, *Japanese Managerial Behavior and 'Excessive Competition'*. 8 THE DEVELOPING ECONOMIES 430 (Dec. 1970). MoF's control also extended to the BoJ. Legislation passed during the war gave MoF explicit authority to review the actions of the Central Bank. *See* Bank of Japan Law, *supra* note 66. In practice, however, the authority was never invoked. Control also emanated from the practice of having a retired ministry official serve as Governor of the Central Bank every other term.

217. The 1950s saw the addition of reserve requirements; the 1960s laws facilitating mergers; and the 1970s the inclusion of a deposit insurance scheme. Even in 1980, when the Banking Act was amended comprehensively for the first time since 1927, the changes did little to alter the basic regulatory scheme. *See generally* FRANCIS MCCALL ROSENBLUTH, FINANCIAL POLITICS IN CONTEMPORARY JAPAN (1989).

Foreign pressure also played a significant role in the reforms. As a result of government pressure, primarily from the United States, foreign banks were, in the mid-1980s, allowed to engage in trust and securities activities. They permanently fractured the symmetrical system of banking compartments. With the changes, extension of comparable authority to Japanese banks became a foregone conclusion.

The reforms will also, over the long term, impact the relationship between the MoF and the private sector. In the short term, deregulation will, ironically, enhance MoF authority. MoF has made clear that the decompartmentalization process will be carefully managed. While banks will have the authority to engage in securities activities, initially they will be limited to primary offerings of debt securities, and they will not be able to underwrite equity securities or engage in stock brokerage activities.[218]

MoF also imposed firewalls designed to separate the securities subsidiary from the parent bank. This included restrictions on the bank personnel that could work for the subsidiary and limits on the exchange of information between the two entities. The securities subsidiary could not operate out of the headquarters of the bank. Finally, city banks could not set up a subsidiary for the first year after the effective date of the law, giving an advantage to trust and long term banks.[219]

With respect to trust bank subsidiaries, banks and securities firms were allowed to engage in certain designated money trusts. They were, however, barred from the most lucrative areas, particularly pension trusts. MoF also imposed firewalls separating the trust subsidiaries from the parent bank or securities firm.[220]

These restrictions will likely end over time. Until then, however, the legislation has given MoF additional leverage. Banks and securities firms seeking expanded authority will need to maintain strong relations with the Mof and to observe the government's guidance.

Over the long term, however, decompartmentalization will result in a reduction in MoF control over the financial system. Banks will have greater operating latitude, capable of obtaining profits from a more diverse group of activities, including trust and securities activities. They will also have additional funding sources, particularly loan trust certificates. When the decompartmentalization process has been completed, banks will also end up with some type of bond issuing authority.

All of this will reduce bank dependency on government policies. The

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218. Additional restrictions also apply. Initially a securities subsidiary will not even be able to lead manage a debt offering where the company has less than Y500 billion in net assets and the parent was the commissioned bank during the previous two years. *See* JAPANESE MINISTRY OF FINANCE, DETAILED ARRANGEMENTS OF THE FINANCIAL SYSTEM REFORM, PROVISIONAL UNOFFICIAL SUMMARY, (Dec. 1992).

219. *Id.*

220. *Id.*

additional funding sources will reduce dependency on branch license and borrowings from the BoJ, two important sources of government leverage. Additional activities will reduce the need to follow government guidance in order to ensure adequate levels of profitability.

More intriguing, the growing strength of city banks, a trend arrested by the occupation-inspired policy of segmentation, may resume. Whether through competition or acquisition, city banks will have the wherewithal and the contacts to make considerable inroads into other segments of the financial markets.[221] Some classes of banks, trust banks, for example, may disappear altogether.

As the size and strength of city banks grows, they remain less permeable to MoF influence. Indeed, they may actually emerge as effective counterweights to MoF authority, a function similar to the one served by the Zaibatsu banks before the war. The net effect would be a fundamental realignment in the role of the government in the financial markets.

221. While MoF currently opposes acquisitions, this clearly does not apply in the context of an ailing bank or broker. City banks may be allowed to acquire existing entities if necessary to stave off insolvency.

INTERNATIONAL TRADE SECTION

An Assessment of Intellectual Property Protection in LDCs from Both a Legal and Economic Perspective — Case Studies of Mexico, Chile and Argentina

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I. INTRODUCTION

"Intellectual property" (IP) is a compounding of two things. First, it

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is ideas, inventions and creative expression. They are essentially the result of private activity. Second, it is public willingness to bestow the status of property on those inventions and expressions. The most common techniques for conferring a protected status are the trade secret, patent, copyright and the trademark, with one new category for mask works (or "chips") added in the last decade.[1]

Though the definition of these terms varies from country to country, the following is a broad summary definition of terms that is widely accepted particularly in the U.S., beginning with a basic classification that differentiates industrial property (patents, trademarks and trade secrets) from copyright, with mask works as a unique special category.

Patent law confers property rights on new, useful and nonobvious processes and products. It excludes others from making, using, or selling the patented invention for seventeen years.[2] Patent law provides a more exclusive monopoly than copyright law. Patent protection extends to functional features of products and encompasses ideas to the extent that the ideas are inextricably embodied in the products or process. Unlike a copyright or trademark, a patent is much more difficult to obtain. To be patented, an invention must not only be new and original, but it must also be an improvement over the prior art such that one with ordinary skill in that art could not consider the invention obvious.[3]

Trade secrets are industrial or commercial information that enterprises wish to keep confidential, but here reliance is placed either on private contractual measures with existing employees or on public law or guarantees where third parties, without contractual relationships, need to be prevented from engaging in trade secret violations.

> Trademarks are marks to distinguish goods or services of an industrial or commercial enterprise or group of enterprises. They include words, letters, numbers, drawings, pictures, emblems, monograms, signatures, colors, and occasionally packaging forms. Most countries require registration of the mark for protection. Usually there are no time limits on trademark protection, although many countries require periodic registration.[4]

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1. R. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 11 (1990). Other beneficiaries of intellectual property protection include industrial designs, utility models, marks of origin and plant breeders' rights (PBRs). In the latter case, PBRs are covered under the International Convention for the Protection of New Varieties of Plants (UPOV), concluded in Paris on December 2, 1961, as amended in 1991. The Convention, which had 21 member states as of January 1, 1992, provides plant protection for between 15 and 18 years though breeders can use an existing protected plant to produce a new variety. As of 1990, UPOV had about 1,000 new plant varieties registered in member states.

2. 17 years is the present period in the U.S. for patent protection from the date of granting, though for most countries, the period ranges from 15 to 20 years from the date the patent is filed.

3. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 279 n.31 (1991).

4. ROBERT P. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS - ISSUES AND CON-

Copyright protection covers original expression but not the ideas behind the expression. Copyrightable material includes artistic, literary, musical, photographic and cinematographic works, etc. Some countries require registration formalities while for others protection is available automatically. The international standard for most works usually extends for fifty years beyond the life of the author.

Finally, the mask work represents the expression of the design elements of a semiconductor "chip" for which its creator holds exclusive rights, and thus can be seen as a hybrid between a patent and a copyright.[5]

This paper attempts to assess the impact of a variety of multilateral and bilateral initiatives with respect to IP reform in three Latin American countries (Mexico, Chile and Argentina), all of which are contemplating or completing legal reforms in this area. The paper begins with an overview of the multilateral framework for IP protection, an assessment from an economic perspective of the costs and benefits of increased IP protection, followed by a detailed country by country evaluation of IP reforms to date and their origins, and concluding with an assessment of possible outcomes in future for both multilateral and bilateral IP reform.

II. THE MULTILATERAL FRAMEWORK FOR IP PROTECTION

Even though IP protection is a function of country specific legislation and enforcement, a multilateral regime has existed dating back to the 19th century covering at least some elements of IP (trade secrets and mask works are essentially excluded), but with no real effective dispute resolution mechanism. Most international agreements that are assigned to protect IP are administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations (as of December 1974), established by a Convention signed at Stockholm on July 14, 1967, which came into force in 1970.[6] The three most important conventions under WIPO's responsibility are the Paris Convention for the Protection of Industrial Property (103 members), established in 1883, and last revised in 1967, the Berne Convention for the Protection of Literary and Artistic Works (ninety members), adopted in 1886, and last revised in 1971, and the Madrid Agreement concerning the International Registration of Marks (twenty nine states) adopted in 1891 and amended as of 1979. In all, WIPO administers nineteen Unions and Conventions.[7]

TROVERSIES 3 (1987).

5. SHERWOOD, *supra* note 1, at 12.

6. *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), GENERAL INFORMATION (1992). As of January 1, 1992, there were 128 states that were party to the WIPO Convention.

7. One of these of special interest is the Patent Cooperation Treaty (PCT) which was concluded in 1970 and as of January 1, 1992 comprised 49 states. The treaty provides for the filing of an international application which can then be subject to an "international search" by one of the major patent offices thereby facilitating the examination of patent

The Paris Convention covers inventions, trademarks, service marks, industrial designs, etc. (article 4) and provides for national treatment (article 2) whereby each Contracting State must grant the same protection to nationals of other Contracting States as it grants to its own nationals. Furthermore, the Paris Convention (article 4A) provides for a right of priority of filing (relating back) in a second member country for periods of one year from filing in the first member country for patent and utility models, and six months for industrial designs and trademarks (article 4 C (1)).

Compulsory licenses (article 5) are of great interest to both developed and developing countries. These licenses are available for lack of working a patent by the owner within four years from the date of filing or three years from the date of granting the patent, whichever is later, in the absence of legitimate reasons. In addition, no proceeding for actual forfeiture can be made prior to the completion of two years from the grant of a compulsory license (article 5(3)), and an assessment that the compulsory license did not eliminate the cost of not working the patent. Developed countries have tended to object to compulsory licenses particularly if they were coupled with mandatory fixed royalty payments while developing countries have favored compulsory licenses without such a time delay.

Finally, the dispute settlement mechanism (article 29) appears to be particularly ineffective in that any country at the time of accession can declare itself not bound by the dispute settlement provision (article 28(i)). But even in the absence of such a declaration, the dispute goes to the International Court of Justice, after which the losing party could leave the Paris Convention to avoid the sanction.[8]

The Berne Convention encompasses literary and artistic works including every production in the literary and artistic domain whatever the mode or form of its expression (article 2 (1)). The Berne Convention requires that protection be given to published or unpublished works of an author who is a national of a member state. Berne protection also is required for a work of a non-national of a member state if the work is first published in a member state or simultaneously published in a non-member and a member state. A work is published "simultaneously" if it is published in a member country within thirty days of its first publication.[9]

The Berne Convention explicitly rejects the requirement that works

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applications in the patent office of another member country. This facility could be of value in the future to developing countries. *Id.* at 26-29.

8. The Madrid Agreement, revised seven times since 1891, is open to States party to the Paris Convention, and provides for the registration of both trademarks and service marks at the International Bureau of WIPO in Geneva. This can be accomplished once the owner of the mark has registered it in the national trademark office of the country of origin (provided it is a Contracting State). By the end of 1991, the number of international registrations affected by the Agreement was 280,000 covering on average 10 countries. *See* WIPO, *supra* note 6 at 32-33.

9. C. JOYCE, W. PATRY, M. LEAFFER, P. JASZI, COPYRIGHT LAW 927 (1991).

be protected by formalities outside the country of origin (article 5(2)), and has established a minimum term of protection of life plus fifty years, or fifty years from publication for anonymous and pseudonymous works (articles 7(1) and 7(3)). Moreover, a large number of "exclusive" rights are to be protected including those of translation (article 8), reproduction (article 9), public performance (article 11) and adaptation (article 12), though distribution and display rights are not included unlike the U.S. Copyright Act of 1976 (article 106). Berne provides for a fair use privilege (article 9(2)) and for moral rights (article 6 bis) independently of economic rights particularly with respect to the right of attribution and integrity. In the latter case, the U.S. has long opposed such a provision, and even when it acceded to the Berne Convention at long last in 1988, the implementing legislation[10] did not include such a clause on the grounds that such a provision was already available under the common law, a questionable argument. Finally, the dispute settlement arrangements (article 33) are similar to those of the Paris Convention, with the same shortcomings.

Given the perceived weaknesses in the WIPO framework for IP protection, particularly from the perspective of developed countries, and the fact that during the 1980s, a number of developed countries, particularly the U.S., began to run substantial trade deficits, it is not surprising that more attention from developed country policymakers began to focus on the need to strengthen the international framework for IP protection.[11] Thus, at the inauguration of the Uruguay Round of trade negotiations under the GATT[12] in Punta del Este in 1986, the Ministerial Declaration included for the first time, largely at the insistence of the U.S.,[13] a mandate to address Trade-related aspects of Intellectual Property Rights (TRIPs), including Trade in Counterfeit Goods:

> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate on appropriate new rules and disciplines.
> Negotiations shall aim to develop a multilateral framework of princi-

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10. The Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853.

11. However, it should be pointed out that WIPO has taken the initiative to attempt to harmonize patent and trademark law through the preparation of a draft Patent Law Treaty and a Draft Treaty on the simplification of administrative procedures concerning marks. In addition, WIPO is also considering a multilateral treaty on the settlement of IP disputes between states.

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 43, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

13. For a detailed background to the talks that led up to the Uruguay Round, *see* A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundation*, 23 STAN. J. INT'L L. 57 (1987).

> ples, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.[14]

Over the next five years, negotiations continued on this and many other issues with no immediate resolution in sight given the obvious linkages of most issues since concessions would be expected in one area by developing countries (e.g., TRIPs) in exchange for concessions in another by developed countries (e.g., agriculture, textiles). A complicating factor was that many developing countries saw no need to include TRIPs as part of the GATT Round, even though article XX(d) of the GATT makes a brief reference to IP, when an existing UN agency (WIPO) that had been clearly established for that purpose was already available. Developed countries, particularly the US, were unwilling to support further negotiations under the auspices of WIPO given the lack of results in the past, and the alleged bias of WIPO against the enforcement of IP rights, particularly against a backdrop where developed countries had considerably more voting strength in the GATT than in WIPO.

As a result of the impasse, the GATT Secretariat itself drafted a compromise document[15] based on earlier competing texts covering all aspects of the Uruguay Round with the hope that all parties would agree, though this to date has proven to be premature given the subsequent lack of progress in negotiations, particularly initially in the agricultural area between the European Community and the U.S. Given the recent change in the U.S. administration, it is unclear if and when a successful Uruguay Round will be achieved.

Even before the inauguration of the Uruguay Round, however, the U.S. moved to proceed unilaterally to increase pressure on its trading partners, primarily developing countries (eg. Korea), to improve their IP protection legislative and enforcement frameworks, in the light of the mounting U.S. trade deficit. In March 1987, the United States Trade Representative (USTR) at the request of President Reagan asked the U.S. International Trade Commission (ITC) to prepare quantitative estimates of the distortions in U.S. trade caused by inadequate IP protection, and to identify the products and countries that were the major culprits. The results,[16] qualified by limitations due to lack of statistical validity, estimated worldwide losses to U.S. industry from inadequate foreign IP protection ranging from US$43 to US$61 billion per annum. Whatever

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14. Ministerial Declaration of Punta del Este of September 20, 1986, *reprinted in* LAW AND PRACTICE UNDER THE GATT 31 (Kenneth R. Simmonds & Brian H.W. Hill eds. 1988).

15. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, December 20, 1991 (Dunkel Draft) *reprinted in* THE DUNKEL DRAFT, FROM THE GATT SECRETARIAT (The Institute for International Legal Information ed., 1992).

16. USITC, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE, REPORT TO THE UNITED STATES TRADE REPRESENTATIVE, INVESTIGATION NO. 332-245, at H-3 (1988).

the accuracy of the numbers, they were sufficient to persuade the U.S. Congress to include "tougher" provisions in its 1988 Trade Act[17] which

> requires the USTR to identify, within thirty days after submission of the annual National Trade Estimates (foreign trade barrier) report to the Congress, those foreign countries that (1) deny adequate and effective protection of intellectual property rights or fair and equitable market access to U.S. persons that rely upon intellectual property protection, and (2) those countries under (1) determined by the USTR to be priority foreign countries. The USTR identifies as priorities only those countries that have the most onerous or egregious acts, policies or practices that have the greatest adverse impact on the relevant U.S. products and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective intellectual property right protection.[18]

In May of 1989, the USTR announced no "Priority Foreign Countries" but instead developed a "Priority Watch List" of eight countries (including Mexico) and a "Watch List" of seventeen countries. The "Priority Watch List" was reduced to five when the USTR reported to Congress on November 1, 1989 (Korea, Taiwan and Saudi Arabia had been removed based on substantial progress). "In January 1990, Mexico was removed from all "Special 301" lists after outlining a program for improved protection for patents, trademarks, and trade secrets as well as improved enforcement of the laws in these areas."[19]

In addition, the U.S. government had begun negotiations initially with Mexico on the possibility of joining the North American Free Trade Agreement (NAFTA), a step that would require an improved Mexican IP environment which in fact occurred even prior to the NAFTA agreement. In August 1992, provisional agreement was reached amongst the U.S., Canada and Mexico[20] on NAFTA. Similarly, other Latin American coun-

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17. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 1301-1303 (amending Section 301 of the Trade Act of 1974 to include a "special 301" to deal with priority IP protection).

18. Committee on Ways and Means, Overview and Compilation of U.S. Trade Statistics, H.R. Doc. No. 102-5, 102nd Congress, 1st Session. 76 (1991).

19. *Id.* at 77.

20. The broad outlines of the agreement are contained in a "Description of the Proposed" prepared by the three governments dated August 12, 1992 and which contains at 26-27 the following provisions on IP protection:

> Building on the work done in the GATT and various international intellectual property treaties, NAFTA establishes a high level of obligations respecting intellectual property. Each country will provide adequate and effective protection of intellectual property rights on the basis of national treatment and will provide effective enforcement of these rights against infringement, both internally and at the border.
>
> The Agreement sets out specific commitments regarding the protection of: copyrights, including sound recordings; patents; trademarks; plant breeders' rights; industrial designs; trade secrets; integrated circuits (semiconductor

tries, as part of the Enterprise for Americas Initiative (EAI), anticipated similar possibilities, particularly Chile. Thus, the U.S. took the lead in attempting to reform IP protection at the multilateral level through the TRIPs negotiation, while at the same time, moving aggressively to negotiate bilateral concessions from developing countries particularly when trade benefits (or denial of existing benefits) were at stake.

III. ECONOMICS OF IP PROTECTION

Until recently, most of the literature on the economics of IP protection concentrated on developed countries and in a "closed" economy, ignoring the international trade and investment dimension. Under a domestic analysis, IP would be viewed as an

> asset generated by creative action, such as invention or authorship. As with more tangible forms of private property, the owners of intellectual property are, in most countries, allowed to garner its returns through commercial exploitation. It is the ability to appropriate these returns that provides the necessary incentive for further creative activity, a big factor in an economy's commercial and cultural growth. Unlike tangible property, however, intellectual property derives from the creation of new information, which is essentially a public good. Among the characteristics of public goods that would influence eco-

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chips); and geographical indications.

Copyright. The Agreement's obligations include requirements to: protect computer programs as literary works and databases as compilations; provide rental rights for computer programs and sound recordings; and provide a term of protection of at least 50 years for sound recordings.

Patents. The NAFTA provides protection for inventions by requiring each country to: provide product and process patents for virtually all types of inventions, including pharmaceuticals and agricultural chemicals; eliminate any special regimes for particular product categories, any special provisions for acquisition of patent rights and any discrimination in the availability and enjoyment of patent rights made available locally and abroad; and provide patent owners the opportunity to obtain product patent protection for pharmaceutical and agricultural chemical inventions for which product patents were previously unavailable.

Other Intellectual Property Rights. This section also provides rules for protecting: service marks to the same extent as trademarks; encrypted satellite signals against illegal use; trade secrets generally, as well as for protecting from disclosure by the government test data submitted by firms regarding the safety and efficacy of pharmaceutical and agri-chemical products; integrated circuits, both directly and in goods that incorporate them; and geographical indications so as to avoid misleading the public, while protecting trademark owners.

Enforcement Procedures. The NAFTA also includes detailed obligations regarding: procedures for the enforcement of intellectual property rights, including provisions on damages, injunctive relief and general due process issues; and enforcement of intellectual property rights at the border, including safeguards to prevent abuse.

A more detailed statement of agreement of the parties with respect to intellectual property is contained in The North American Free Trade Agreement, September 6, 1992, U.S.T. 17-1 to 17-29.

> nomic behavior is the problem that market participants have little incentive to compensate the inventor once the information underlying the invention becomes known. . . . This problem necessitates the establishment of a set of protective devices that go beyond forms of protection for ordinary property. These devices assign and preserve the rights to exploit intellectual property. In general, intellectual property rights (IPRs) refer to the legal authority of a creator to control the means by which the new information or idea is disseminated and commercialized and to the enforcement mechanisms to which the creator may appeal to prevent unauthorized use.[21]

Before examining the special economic dimension of IP protection in developing countries, the following is a brief summation of the economic arguments underlying each of the major forms of IP protection. In the case of patents, governments have traditionally emphasized two primary objectives in adopting a system of patents for inventions, namely to provide economic incentives to encourage investment activity and to have inventors disclose their "secrets" to society thereby encouraging the speed in the use of technology. The dilemma facing policy-makers is that inventions are "public goods", and in the absence of any form of protection, it is problematic whether "consumers" can be prevented from using such goods without appropriate remuneration, thereby creating a free-rider problem. This is compounded by the fact that the costs of invention can be substantial while the cost of disseminating that knowledge is close to zero. Thus,

> the distribution of an additional unit of knowledge goods does not diminish the stock of those goods. The marginal cost of an additional unit will therefore be influenced not by production cost but only by distribution cost, which are insignificant. According to static economic criteria, the optimum market price for the knowledge or invention, once produced, should be roughly zero. The normal function of the market thus poses a problem of appropriatability for the inventor. At a normal selling price of near zero, there is no incentive to produce knowledge goods.[22]

In order to avoid the appropriatability problem, the patent provides for a temporary monopoly (but only with respect to the specific invention but not to the market it serves since there is often competition from similar competing substitutes) leading to quasi-rents that provide sufficient incentives to investors faced with market failures to continue both to invent and disseminate their inventions to the public. The optimal policy package may be to strengthen IP protection, but lower tariffs and other barriers to competition that naturally work on the non-technology barriers in the competitive advantage package.

There is little empirical evidence available that could categorically

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21. Keith Maskus, The Economics of International Protection of Intellectual Property Rights: Background and Analysis 5-6 (June 1989) (unpublished).

22. BENKO, *supra* note 4, at 17.

document the impact of the availability of patent protection on levels of investment in technological innovation though this would certainly vary with the type of industry involved (pharmaceuticals and chemicals having among the highest correlation).[23] This raises the question as to whether normal competition provides, in many industries, a sufficient basis for innovation or where market imperfection in terms of the rapidity with which competing firms could imitate the technology in the absence of patent protection negates the need for such a device. In any event, firms must constantly make the trade-off between filing for patent protection to gain a "monopoly" advantage for seventeen years but with ultimate disclosure of its invention, versus the option of using trade secret protection which can be infinite unless violated where either breach of contract or tort remedies are available (though in the case of pharmaceuticals, trade secret protection is not an option given the ease with which such products can be copied). However, trade secrets also run the risk of being lost either through reverse engineering or through normal independent commercial developments.[24] A related issue for which there is again no conclusive evidence available is whether seventeen years constitutes an appropriate length of time for protection, with the expectation that the longer the period, the more likely that "monopoly" profits or quasi-rents more than offset the development costs of the invention.

In the case of copyrights, the economic justification for providing protection is similar to that of patents with respect to industrial property. Creative literacy and artistic works require an investment of time, the application of originality, and the benefits of training which, without protection, would permit others to "free ride" particularly in an environment where advances in copying technology worldwide has made the mechanism of copying relatively simple and cheap.

> The traditional economic and welfare implications of this trend are well-known. Clearly, the greater use of copying technologies delivers creative goods to consumers at lower costs. The reduction in demand for originals lowers the gap between price and marginal production and distribution costs, raising social welfare. Stronger laws against copying would increase this distortion, reducing welfare. However, copying also diminishes incentives for creative activity and the legitimate dissemination of new creations, resulting in a welfare decline that would be offset by greater performance of property rights. Copyright policy should presumably be designed to effect an optimal trade-off between these impacts.[25]

In addition, the evolving nature of technology with the growth in the

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23. E. MANSFIELD, PATENTS AND INNOVATION: AN EMPIRICAL STUDY, MANAGEMENT SCIENCE, 1986.

24. For a more detailed treatment of the economic justification for trade secret laws at the State level in the U.S. see D. Friedman, William Landes & Richard Posner, *Some Economics of Trade Secret Law* 5 J. ECON. PERSP., No. 1, 61-72 (1991).

25. Maskus, *supra* note 21, at 26-27.

use of software, semiconductors and satellite transmissions has raised additional questions as to whether patents or copyright is the more appropriate form of protection. In a few countries (U.S. and Japan), this has led to the creation of new categories of protection such as for computer chips (mask works[26]) or special measures such as compulsory licenses for broadcasters (U.S.) who transmit satellite signals to cable operators at rates set by a government regulatory agency (Copyright Royalty Tribunal).[27]

Trademarks are one of a variety of means (including brand names and marks of origin) that are used to identify and provide protection for goods or products from firms, and at the same time, protect consumers from false advertising and fraud.

> Like patents and copyright, trademarks carry legal authority to enforce the exclusive use of an asset created by human thought. In this case, the asset is a symbol or other identifier that conveys information to the customer about the product being purchased. If consumers view the mark as an indicator of some desirable product characteristic, such as high quality, they will be willing to pay a premium price for the good. This premium price compensates the firm for the cost of developing and advertising the trademark. If competitors were allowed to duplicate the mark or use a confusingly similar mark these costs could not be recovered. Unlike patents and copyrights, however, trademarks do not protect the creation of additional human knowledge, but rather the identification of a product. Such identification is not a public good. Thus, trademarks serve in part to augment the ability to differentiate products and to sustain associated monopoly profits.[28]

However, consumer preferences in the light of disappointments in quality choice can offset such monopoly profits as can legal remedies involving false advertising as well as the availability of other trademarks to reduce market power.

IV. THE PROTECTION OF IP FROM A DEVELOPING COUNTRY PERSPECTIVE

With the recent prominence of TRIPs negotiations as part of the Uruguay Round, increasing attention has been paid by economists to the tradeoffs at the international level of increased IP protection particularly including the perspective of developing countries.

Given the paucity of data on such matters in developing countries and the fact that in most developing countries, recent legislative reforms involving increased domestic IP protection provide insufficient time in which to make a "with" and "without" assessment, nevertheless, a num-

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26. Semiconductor Chip Protection Act, 17 U.S.C. §§ 901-914 (1984).
27. *See* 17 U.S.C. § 111(c)(1); 17 U.S.C. § 801(b)(1)(A).
28. Maskus, *supra* note 21, at 32-33.

ber of recent efforts have been made to develop models to analyze[29] the problem or to itemize the various pros and cons that developing countries should consider in general in deciding on an appropriate level of protection.[30]

In the latter case, Primo-Braga has assembled a reasonably comprehensive list of factors that developing countries should consider in their IP policy.

On the cost side, any acceleration of IP protection may involve increased royalty payments based on licensing agreements which would be particularly important for countries at the earlier stages of development that are largely dependent upon imported technology,[31] while many of those at a more advanced stage are already facing substantial outflows due to large debt service. However, without protection, those who are willing to license will tend to charge higher royalties because of the higher risk of loss. This is an area on which further empirical research would be helpful.

Secondly, tighter enactment and enforcement of IP laws could displace to a variable extent, depending upon local circumstances, local "pirates" for on-patent products on the assumption that most excess demand would be obtained by foreign IP holders. An attempt to quantify the impact of this across seven countries (Argentina, Mexico, Brazil, India, Korea, Taiwan, and Singapore) was made in 1985 for a variety of industries using somewhat questionable assumptions of price elasticities of demand, market size and the fact that private domestic firms would not survive a tightened level of IP protection.[32] This resulted in revenues foregone to IP holders in 1985 for all seven countries of $1.7 billion for the pharmaceutical industry and $0.5 billion for the software industry, with lesser amounts for a range of other industries (e.g., agrochemicals, book publishing, audio, video, etc.). Nevertheless, these numbers should be looked at with some caution given the questionable methodology employed.

A third perceived cost of strengthened IP protection would be the risk of fostering anti-competitive effects through the exercise of market power to reduce output, raise prices, and repatriate the producer surplus

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29. ISHAC DIVAN AND DANI RODRIK, PATENTS, APPROPRIATE TECHNOLOGY, AND NORTH-SOUTH TRADE, (PRE WORKING PAPER SERIES, No. 251 The World Bank 1989); R.M. Feinberg et al., *The Economic Effects of Intellectual Property Rights Infringement*, JOURNAL OF BUSINESS, Jan. 1990, at 79-80.

30. C. Primo Braga, *The Developing Country Case for or Against Intellectual Property Protection in* STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 69-87 (World Bank 1990).

31. Less than one percent of existing patents are held by nationals of developing countries in OECD, *Economic Arguments for Protecting Intellectual Property Rights*, TC/WP (88)70 (1989).

32. INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 378-407, (R. Michael Gadbaw and Timothy J. Richards eds., 1988) [hereinafter INTELLECTUAL PROPERTY RIGHTS].

beyond consumer price increases that might be expected as part of adding IP costs to products which, for an industry like pharmaceuticals, could have a substantial impact on the poorer segments of the society. However, in practice this effect could be mitigated in many cases by the availability of a competing substitute that may already be off-patent, particularly with respect to pharmaceuticals.

An additional consideration would concern the non-use of patents, for example, in a particular country which could lead to the use of compulsory licensing under certain circumstances (e.g., reasonable time period for non-use without adequate explanation) though these devices in turn are subject to abuse by developing countries particularly with the setting of artificially low royalty payments. Moreover, where a patentee satisfies the working requirement through importation, there should be little justification for a compulsory license.

Finally, arguments have been made to the effect that IP reform could result in the bidding up of the price of domestic R&D capacity as a result of greater protection thereby having a counterproductive impact on income distribution, though hard evidence is not available to support such a theory.

On the benefit side, the most common argument given for increasing IP protection has been its expected impact on technology transfer on the assumption that multinationals would be more likely to license technology and/or engage in joint ventures where their technology is adequately protected.[33] A more recent survey undertaken by E. Mansfield[34] shows similar results for multinationals though with a clear distinction between industries such as pharmaceuticals and chemicals where R&D costs are high but subsequent entry costs lower causing high reluctance to invest vs. other industries with opposite characteristics.

A second reason given for strengthened IP protection involves its alleged impact on domestic R&D in developing countries. However, strong empirical evidence to support this proposition is not yet available partly because it is too early to measure the impact of IP reform on domestic R&D in countries such as Mexico and Brazil.[35] Nevertheless, some anecdotal evidence suggests that many domestic firms welcome strengthened IP protection as a result of greater confidence in greater investment in R&D and affiliations with research parks and universities in addition to less concern that domestic employees will be hired away in the absence of

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33. 75 percent of respondents of multinational manufacturing enterprises cited inadequate IP protection as a significant problem for licensing to developing countries; *see* OECD, *International Technology Licensing: Survey Results*, mimeo, table 40, (August 1987).

34. E. Mansfield, research project funded by the International Finance Corporation (IFC) to be completed in May, 1993.

35. However, the case of Italy is instructive in that prior to 1979 it provided no patent for pharmaceuticals, but since that time, Italy has become one of the leading producers of new pharmaceutical products in the world.

trade secret legislation, for purposes of a competitor obtaining secret formulas, customer lists, etc.[36]

A third rationale for IP protection has been the greater likelihood that more information would be diffused in the domestic economy concerning technology developments though it is not clear that a developing country could not avail itself of good library facilities overseas dealing with patents to achieve the same objectives as in the case of Brazil.[37]

While a number of less important benefits are sometimes cited,[38] the most important remaining factor concerns the trade impact of IP protection (the so-called "marriage of convenience") which arises as a result of the threats and/or actual actions that developed countries have taken (e.g., the U.S. and the EC) on a bilateral basis in the face of inadequate IP protection. While this element goes beyond purely economic arguments, the practice of imposing tariff penalties on even unrelated export goods from developing countries is of sufficient importance to warrant considerable weight in the policy debate of developing countries and which has already resulted in substantial IP reforms particularly in the Far East.

V. MEXICO

Over the past fifteen years, the legal regime providing for IP protection in Mexico has undergone radical changes in the direction of enhancing such protection to the point where it substantially exceeds the level of protection provided by most other developing countries, and indeed, begins to match, at least in some initial areas, the kind of protection provided in the U.S. The evolution of such reforms[39] can be traced to a number of factors including: (a) the aftermath of the debt crisis that Mexico experienced in the early 1980s when it became clear that a substantial opening up of its economy both with respect to trade and foreign investment, including technology transfer, was required to improve international competitiveness of its domestic industry, and in the late 1980s to reduce levels of inflation; (b) as part of that process, Mexico's accession to the GATT in August 1986 as a developing country and its consequent effect on overall trade reform and in Mexico's participation in the Uruguay Round begun in 1986 in Punta del Este including TRIPs negotiations; (c) Mexico's receipt of technical assistance from WIPO to reform its IP regime, which oversees the Paris and Berne Conventions to which

36. SHERWOOD, *supra* note 1, at 132-149.

37. *Id.* at 56.

38. *See* Braga, *supra* note 30, at 83.

39. *See* Gretchen A. Pemberton and Mariano Soni, Jr., *Mexico's 1991 Industrial Property Law*, 25 CORNELL INT'L L.J. 103, 104 (1992); John McKnight and Carlos Müggenburg, R.V., *Mexico's New Intellectual Property Regime: Improvements in the Protection of Industrial Property, Copyright, License and Franchise Rights in Mexico*, 27 INT'L LAW. 27 (1993) (for a detailed discussion of the background to the recent legal reform in the IP area in Mexico).

Mexico is a signatory; and finally (d) bilateral negotiations with the U.S. on trade and investment culminating in Mexico's inclusion in USTR's "priority watch" list under Section 182 of the Omnibus Trade and Competitiveness Act of 1988 (Special 301), all of which subsequently led to the major legislative reforms in all areas of IP protection in Mexico in 1991. Thus, it was a combination of both external and internal pressures (including domestic industries who saw advantages from their own perspective in increased IP protection)[40] that led to the IP reforms in Mexico in the past year.

A. *Patents, Trademarks and Trade Secrets*

Until July of 1991, Mexico's overall IP regime was governed by the Law on Inventions and Trademarks[41] which was subsequently amended in 1987,[42] and clarified as part of regulations issued to implement the 1987 amendments. Overall, this law and its amendments were considered to be deficient in a number of respects.[43]

Mexico provided protection for inventions through patents (both process and product) and through what were called certificates of invention which provided royalties to the holders of the certificate from anyone using the invention under a non-exclusive license. Up until July 1987, no certificate of invention had ever been granted in Mexico.[44] With respect to product and process patents, the 1987 amendment provided for inclusion of the following but only after 1997:

> 1. Biotechnological processes to obtain the following products: pharmaceutical and chemical products, medicines in general, beverages and food for animal consumption, fertilizers, pesticides, herbicides, fungicides or biological-activity products;
> 2. Genetic processes to obtain vegetables and animal species or varieties thereof;
> 3. Chemical products;
> 4. Chemical and pharmaceutical products, medicines in general, beverages and food for animal consumption, fertilizers, pesticides, herbicides, fungicides, and biological-activity products.[45]

The 1991 law[46] both did away with the 1997 target date and ex-

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40. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 238-244.

41. Ley de Invenciones y Marcas, D.O. [Official Federal Diary of Mexico] (10 February 1976) [hereinafter 1976 LAW].

42. SECRETARIA DE COMERCIO Y FOMENTO INDUSTRIAL, Decreto por el que se Reforma y Adiciona la Ley de Invenciones y Marcas, D.O. (16 January 1987) [Directive to Reform and Amend the Law on Inventions and Trademarks].

43. For an assessment of the IP laws prior to 1991, *see* USITC, REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES-MEXICO RELATIONS, INVESTIGATION NO. 332-282, 6-3 - 6-5, (1990) [hereinafter USITC, U.S.-MEXICO REVIEW].

44. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 253.

45. USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-2.

46. Ley de Fomento y Proteccion de la Propriedad Industrial, D.O. (June 27, 1991)

panded coverage to include:

> alloys; chemicals in general; pharmaceuticals, drugs, agriculture chemicals and products with a biological activity; foods and beverages in general, including those for human consumption, biotechnological processes to obtain pharmaceuticals, drugs, food and beverages, agriculture chemicals, and products with a biological activity (these were previously protectable under a certificate of invention, but these certificates have disappeared from the Mexican law); peanut varieties; microorganism-related inventions; genetic methods to obtain plant varieties; and compositions of matter in general . . . . The new law provides for restrictions to patentability in the case of the following types of inventions, all relating to living matter: essentially biological processes involving plants, animals and their varieties; genetic methods regarding biological material capable of self-replication; plant species and animal brands and species; biological material, as found in nature; genetic material; and inventions regarding the living matter of the human body.[47]

Complementing this broadened scope of coverage of the new law is the inclusion, for the first time of a definition of invention namely "every human creation that allows matter or energy existing in nature to be transformed, for exploitation by man, through the immediate satisfaction of a specific need. Included among inventions are processes or products for industrial application."[48] Inventions must also meet a test of novelty and be the result of inventive activity. Novelty is preserved for up to twelve months, provided that within twelve months prior to the filing date of the patent application, or in such case, of the recognized priority date, the inventor or his assignee had disclosed the invention by any communication medium or had exhibited it at a domestic or international exhibition.[49] Specifically excluded from inventions are theoretical or scientific principles, discoveries consisting of making known or disclosing something that already existed in nature; schemes, plans, rules and methods to perform mental feats, games or businesses; computer software, forms of presentation of information; aesthetic creations and artistic or literary works; the methods of surgical or therapeutic treatment or diagnosis applicable to the human body . . . ; the juxtaposition of known inventions or mixtures of known products.[50] The duration of the patent has been increased to twenty years from the date of filing though given the long time to process an application (three to five years under the old system), the net effective life of the patent may be substantially less. The term of the patent for pharmochemical or pharmaceutical products may be extended by three years if the patent owner grants a license to a corporation with majority Mexican capital subject to other procedural re-

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[hereinafter 1991 LAW].

47. WORLD INTELLECTUAL PROPERTY REPORT (BNA), 236 (Sept. 1991).

48. 1991 Law, *supra* note 46, Art. 16 (translation).

49. *Id.* arts. 15 & 18.

50. *Id.* art. 19.

strictions.[51] The new law also provides, for the first time, for the protection of utility models with ten year protection and industrial designs and models with fifteen year protection but only covering domestic novelty, a distinction not explained or justified.[52]

Another major area of reform has been in the area of compulsory licenses, which are permitted under the Paris Convention under certain circumstances but can be refused if the patentee justifies his inaction for legitimate reasons.[53] Under the 1976 law, as amended, the Mexican Patent and Trademark Office (MPTO) could issue a compulsory license to a third party:

> (1)where a patent holder has not satisfied the working requirements
> (2)exploitation of the patent has been suspended for six months
> (3)exploitation of the patent does not satisfy the national market, and
> (4)the patent is not being used in the export market and someone has expressed an interest in using the patent for exports.[54]

The provisions for compulsory license now come closer to the provisions of the Paris Convention (though there is still a public interest basis for a compulsory decision) in that there is no obligation to work a patent but compulsory licenses are available to third parties under the same Paris Convention conditions with the addition that the patentee would have an additional one year following notice of the request for a compulsory license to begin working the patent.[55] However, of considerable significance is the provision in Article 70 of the amended 1976 law which recognizes the act of importation as precluding the use of compulsory licenses.

With respect to trademarks, most of the objectionable features in the 1976 IP law were removed by the 1987 amendment including the compulsory linkage of foreign marks to Mexican marks.[56] Under the new law, the term of registration is increased from five to ten years, the registration will lapse if the mark is not used for three consecutive years at any time during the ten year period, without adequate justification, and marks would be non-registrable that are confusingly similar to well-known marks in Mexico. Further, under the new law, nullity actions have been foreclosed based on the fact that the registration was granted in violation of any provision of the law at the time the registration was granted, thereby removing great uncertainty amongst mark owners.[57]

With respect to trade secrets, prior to the 1991 law, protection was very limited as a result of a vague definition of what constituted a trade

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51. WORLD INTELLECTUAL PROPERTY REPORT, *supra* note 47, at 236.
52. *Id.* at 238.
53. Paris Convention, *supra* note 7, art. 4.
54. USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-2.
55. 1976 Law, *supra* note 41, art. 71.
56. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 263.
57. WORLD INTELLECTUAL PROPERTY REPORT, *supra* note 47, at 239.

secret and by deduction a violation of such, a threshold of burden of proof on the plaintiff to demonstrate a violation against third parties, cumbersome procedures through the MPTO to investigate violations, and finally the absence of preliminary remedies such as injunctions to prevent injury while a trade secret investigation is underway.[58]

The 1991 law includes significant changes in the trade secret protection regime. To begin with, trade secrets are now more clearly defined to include any information having industrial utility that is kept in confidential fashion, regarding which sufficient means or systems have been undertaken to preserve its confidential nature and limit access thereto. The trade secret must necessarily relate to the nature, characteristics or purposes of products, production methods or processes, the means and forms of distribution or trade or the rendering of services.[59]

Secondly, both the firm hiring an employee that is allegedly "bringing" the trade secret to this new position as well as the employee would be liable for trade secret violation. Furthermore, technology transfer agreements would be permitted to include confidentiality clauses[60] which in the past required special government approval if the agreement exceeded ten years.[61] On the other hand, protection is only provided for trade secrets that are reduced to documentary form (i.e., no intangible protection). Moreover, no specific provision was made for preliminary injunctions to reduce the impact of the violation.

While the above measures have certainly strengthened the legal framework for IP protection, unless this is accompanied by improvements in enforcement effectiveness, the impact of such changes will be seriously undermined.

Under the previous law, which provided for both civil and criminal penalties for patent and trademark violations, the time required to pursue civil or criminal actions was so lengthy that the vast majority of suits were settled to avoid years of delay involving administrative review within the MPTO followed by a layer of appeals through the court system (including a substantial number of recourses necessitating a restarting of proceedings). Moreover, even though criminal prosecutions could be commenced simultaneously with civil action, the prosecution could only proceed once the civil actions were completed.[62] On the other hand, the law did provide for temporary relief in the form of the prohibition of sale of infringing products by the MPTO and/or the seizure of the infringing products and closure of stores selling such items under certain circum-

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58. USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-16.

59. WORLD INTELLECTUAL PROPERTY REPORT, *supra* note 47, at 238 (reflecting a translation of art. 82 of the 1991 law).

60. *Id.* art. 84.

61. USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-16. The Law on the Control and Registration of the Technology Transfer (D.O., January 11, 1982) has been repealed.

62. For a more detailed treatment of the enforcement problems under the old 1991 law, see USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-8 to 6-9.

stances.[63] Nevertheless, the inadequate staffing, both legal and technical, of the MPTO contributed substantially to the general delay in enforcement. As of 1988, MPTO had 330 employees in its patent examination division to handle roughly 500 applications, of which ninety percent were foreign.[64]

Under the new law, enforcement measures have been strengthened through stronger procedures for inspection authorized by the MPTO to seize infringing goods, a simplified system of launching criminal prosecution whereby only an opinion from the MPTO rather than a time-consuming administrative declaration is required, and the inclusion of trade secrets violation as a criminal offense.[65] Specific fines, shutdowns and administrative imprisonment for infringement have been included.[66] Finally, the new law proposes the creation of a new Industrial Property Institute which would provide support for the promotion of technology development and research and development as well as begin to take on some of the functions of the understaffed and underresourced MPTO. A special study financed by the World Bank is underway by WIPO to ascertain the appropriate role for the new Institute in addition to examining the need for judicial reform in this area.

While all these measures are welcome, it is still too early to judge their efficacy, particularly since accompanying regulations are still tobe issued, though they represent a significant step in the right direction.

B. *Copyright*

Copyright protection is provided by Article 28 of the Mexican Constitution and the Law Amending the Federal Law of Copyright of December 23, 1956 (as amended up to December 30, 1981).[67] On July 3, 1991 the law was again amended to deal with some of the weaknesses of the earlier law. Mexico is already a member of the Rome, Berne, Universal Copyright and Geneva Phonogram Conventions. Overall, Mexico's Copyright Law, even prior to the latest amendments, was considered to be quite comprehensive, and as elsewhere in Latin America, more so than its corresponding laws on patents, trademarks and trade secrets.[68]

Nevertheless, the International Intellectual Property Alliance (IIPA) estimated losses to piracy by U.S. firms (excluding, of course, other non-U.S. foreign firms and domestic firms) at US$263 million per year composed primarily of losses for the recording industry (US$75 million), motion pictures (US$88 million) and most importantly computer software

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63. *Id.* at 6-8.

64. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 253, 256.

65. WORLD INTELLECTUAL PROPERTY REPORT, *supra* note 47, at 240.

66. Pemberton, *supra* note 39, at 103; Ley de Fomento y Proteccion de la Propriedad Intellectual, Art. 214, *supra* note 39.

67. Law Amending the Federal Law of Copyright, D.O. (11 January 1982).

68. USITC, U.S.-MEXICO REVIEW, *supra* note 43, at 6-10.

(US$100 million).[69] Though these numbers may represent negotiating tools, they can be largely explained by discrete lacuna in the Copyright Law which, for the most part, have been filled by the most recent amendments but whose enforcement is still found to be lacking. These involve for the first time the inclusion of sound recordings as protected works as well as the producer of records[70] and computer programs.[71] Moreover, in order to overcome the losses to movie owners in the U.S. as a result of unauthorized reception and retransmission of broadcast signals from U.S. and Intelsat satellites by hotels and resorts in Mexico for the benefit of paying guests, the definition of public performance has been tightened to include representatives or performances when it is presented by any means to audiences or spectators without restricting it to persons belonging to a private group.[72] However, probably the most important change in the new law was the significant increase in the level of criminal penalties for copyright infringement with many violations carrying prison terms of six months to six years and fines up to 500 times the minimum daily general salary or US$2,000, which is still small but a substantial increase over the historical fine of US$4.00 which had eroded over time due to inflation.[73] Nevertheless, for these reforms to have an appropriate impact, they will have to be accompanied by the strengthening of the Prosecutor's Office, Mexican police and the Copyright Office.

VI. CHILE

As in the case of most of the rest of Latin America, Chile struggled through most of the 1980s as a result of a legacy of excessive foreign debt, insufficient exports to compensate for the fluctuation in export earnings from copper, its primary export item, and insufficient foreign direct investment partly the result of the presence of a military dictatorship for most of the decade. Nevertheless, Chile was one of the first Latin American countries to launch an "adjustment" program partially funded by the International Monetary Fund (IMF) and the World Bank involving substantial cuts in public expenditures, reductions in tariff protection and measures to boost exports, further privatization efforts, and special incentives to attract foreign direct investment through such measures as debt/equity swaps. The process of adjustment has been completed for a number of years, and as a result, Chile has enjoyed average growth rates of GDP in excess of six percent over the past two to three years, coinciding with a return to democracy in 1989.

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69. IIPA, REPORT TO SECTION 301 COMMITTEE OF THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, February 25, 1992 at 61 in which it recommended that Mexico be placed once again on the Special 301 *Watch List* from which it was removed in January 1990 when the Mexican government first outlined its planned reform in its 18 regions in its "Industry and Trade Sectoral Plan."

70. Law Amending the Federal Law of Copyright, art. 83 D.O. (July 9, 1991).

71. *Id.* art. 7.

72. *Id.* art. 72.

73. *Id.* arts. 135-143.

As part of its more outward looking strategy, Chile has sought more direct trading ties with its major trading partners, particularly the U.S. As a result of the Enterprise for Americas Initiative (EAI) announced by the U.S. in 1990, Chile signed a framework agreement with the U.S. on October 1, 1990 which established a U.S.-Chile Council on Trade and Investment with the objective to monitor trade and investment relations, open markets between the two countries and negotiate agreements when appropriate. The Council's agenda includes cooperation in the Uruguay Round of multilateral trade negotiations in the GATT, increased market access, adequate and effective protection for IP rights, investment policy, and the reduction of barriers to trade and investment in the hemisphere.[74] The backdrop to this initiative is that both countries have been exploring the possibility of concluding a free trade agreement following the lead provided by Mexico. Chile has made a conscious decision to seek closer trade ties with the U.S. rather than with its immediate neighbors that make up the proposed Mercado del Cono Sur (Brazil, Argentina, Uruguay and Paraguay) to take effect in 1994/95 on the grounds that it wishes to associate itself with the more stable policy environment of its potential North American FTA partners.

As with the rest of Latin America, Chile has also actively participated in multilateral trade negotiations in the GATT, and on January 23, 1991, Chile's Parliament approved Chile's accession to the Paris Convention.[75] Nevertheless, it is clear that the accelerated bilateral discussions with the U.S. have been instrumental in promoting recent reforms of Chile's IP laws.

A. *Patents and Trademarks*

Up until this year, Chile's patent and trademark protection had been governed by the 1931 Law.[76] However, through a major change in its legislative framework, the Chilean Parliament passed a new IP law on January 25, 1991[77] followed by detailed regulations on September 30, 1991 which signalled the formal effectiveness of the law. While the old law covered many of the traditional elements of a typical IP law, the new law is noteworthy for a number of significant major reforms.

To begin with, for the first time, the new law includes the possibility of protection for pharmaceuticals by virtue of it not being included in a list of negative items (articles 38 and 39) such as scientific theories or inventions that are contrary to morality or public order. As in many other countries, the inclusion of pharmaceuticals in an IP law was hotly contested, particularly by the domestic Chilean pharmaceutical industry (ASILFA) which saw the inclusion as a threat to its own livelihood as well

74. 4 WORLD INTELLECTUAL PROPERTY REPORT, 245 (1990).
75. *Id.* vol. 5, at 55.
76. Decree Law 958.
77. Law 19.039.

as from the public at large which feared that the cost of pharmaceuticals would skyrocket making them unaffordable to the poorer segments of the population.[78] Partly to deal with the possibility of monopoly pricing once protection was established, the law provides (article 51) for compulsory licenses with a guaranteed minimum royalty when abuse of market power is evident. Moreover, when a pharmaceutical patent has been filed abroad, an application may be filed only when the foreign application postdates entering into force of the new law.[79] Finally, the duration of all patents is fifteen years from the date a patent is granted, or less than the seventeen years from the date a patent application is granted as in the U.S.

A further significant change in the new law involves the establishment of an Arbitral Tribunal (article 17) to hear appeals of some of the administrative decisions of the Industrial Property Office, the agency responsible for administering the law. The Tribunal is composed of three members (two ministerial appointments and one lawyer elected by the Court of Appeals in Santiago) for two year terms with an arrangement to meet as often as necessary. This should speed up the process of administrative review of patent decisions.

With respect to trademarks, minor improvements have been included (articles 23 to 26) involving improved protection for well-known marks and the extension of the period of cancellation from two to five years. As before, there would be no compulsory licensing of unused marks.

Finally, fines of between US$4,000 and US$40,000 would be available for any kind of infringement (articles 28 and 52). However, no implicit treatment is given for trade secrets in the new law, though as in Argentina, this is covered under the Penal Code.

B. *Copyright*

Chile is a signatory to the Berne Convention, the Universal Copyright Convention, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication.[80]

Chile's copyright protection is contained in Law No. 17.336 as recently amended by Law No. 18.957 of February 22, 1990 and the accompanying Regulations. The law protects seventeen different categories of

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78. A detailed study prepared by the Universidad Catolica de Chile, EFECTOS DE LAS PATENTES DE MEDICAMENTOS SOBRE EL MERCADO FARMACEUTICO Y SU IMPACTO SOBRE LA SALUD Y EL GUSTO FISCAL (1987), concluded that patenting of pharmaceuticals would entail an additional cost of between US$5 to US$18 million for royalty payment per annum as well as up to US$7 million per year in government subsidies and other expenditures. There is considerable dispute within Chile, however, over some of the assumptions of the study.

79. Law 19.039, *supra* note 77, arts. 34-38.

80. For a detailed assessment of the Chile Copyright laws, see IIPA, COPYRIGHT PIRACY IN LATIN AMERICA 48-57 (1991).

works (article 3) including for the first time, as a result of the most recent amendment, computer programs and videograms, a significant development. As in the Berne Convention, the Chilean law also provides for moral rights (articles 14 to 16). However, unlike the Berne Convention, the duration of protection extends only to the life of the author plus thirty years rather than the more typical fifty years, though a bill is now pending to achieve the latter.

The copyright owner enjoys the exclusive right of publication (broadly defined), reproduction, adaptation and performance (article 18). Moreover, in a somewhat unusual feature, a Chilean author of a painting or sculpture has the inalienable right to receive five percent of any increase in price realized when the work is sold at a public sale or through an established dealer.[81] The present law protects the rights of all Chilean authors and of foreigners domiciled in Chile. The rights of foreign authors not domiciled in Chile enjoy the protection to which they are entitled by virtue of the international conventions that Chile has subscribed to and ratified.[82]

Violations of the law are punishable by fines for a maximum of $1,900 (article 78) as well as the possibility of minor imprisonment (article 79). However, for a copyright owner to avail to these rights, registration with the Register of Intellectual Property is mandatory (article 72).

Overall, Chile's copyright protection, particularly with the inclusion of computer programs, appears to be broadly satisfactory with the exception of the life plus thirty duration requirement, the need for some greater precision in the definition of what is covered, and more effective penalties for infringement.

VII. ARGENTINA

Unlike Mexico and Chile, Argentina is still in the process of undergoing a substantial adjustment program to deal with high levels of foreign debt, a stagnant economy and excessive amounts of external protection that permitted the survival of inefficient domestic industries that also benefitted from special subsidies. Whereas Mexico and Chile have largely completed their adjustment programs and fashioned more outward looking economies in anticipation of adherence to free trade agreements with the U.S. and Canada, Argentina is still in the process of improving the public fiscal position through a massive program of privatization, cuts in fiscal expenditures, elimination of special tax incentives for industries, and reduced tariff protection to allow for greater import competition to improve domestic efficiency.[83] Moreover, Argentina has decided for the

81. Law No. 18.457, art. 36.

82. *Id.* art. 2.

83. Despite these lags in adjustment, Argentina has begun to enjoy the substantial flows of foreign direct investment and repatriation of capital which Mexico and Chile have been enjoying for some time.

time being to pursue a regional economic trade bloc, the Mercosur, as part of its new outward looking strategy as opposed to seeking direct free trade links with the U.S. and Canada as Mexico and Chile have, though the Mercosur countries signed the EAI Framework Agreement on Trade and Investment in June 1991. Moreover, on November 14, 1991, Argentina signed a Bilateral Investment Treaty (BIT) with the U.S. which guarantees equal treatment between foreign and domestic investors in addition to provision for international arbitration. Given Argentina's predominantly agricultural base, which provides for the bulk of its exports, in its trade relationships with developed countries, it must face a very elaborate set of protectionist barriers in economies such as the European Community and the U.S. which clearly affect its willingness to offer concessions in other areas such as IP. Nevertheless, Argentina was subject to a Section 301 investigation on pharmaceutical patent protection in 1988 which was withdrawn in 1989 based on expectations of legislative reform, though Argentina was placed on the "Special 301" watch list in 1989 and remains there.[84] As in most Latin American countries, the evolution of IP protection has been more pronounced in the case of copyright rather than patent law, though both still have shortcomings as discussed below. This is particularly true in Argentina, an agriculturally-based economy that would benefit from biotechnology applications to its animals and crops and which also has a long tradition of literacy and cultural development.

A. *Patent Protection*

Argentina's patent law protection dates back to October 11, 1864 with the passage of its first patent law[85] which, aside from minor amendments, has not been substantially modified despite the fact that Argentina acceded to the Paris Convention in 1966[86] but has not made changes in its legislation to conform to the Convention's obligations. Nevertheless, over the years, new patent laws have been proposed to the Congress, none of which has yet been adopted. However, partly in response to the Special 301 pressure, the Menem government recently (October 10, 1991) sent a new law to the Argentine Congress which addresses many of the long-standing objections to the Argentine Law.[87]

The existing law provides patent protection for inventions and designs based on novelty criteria, covering both product and process patents. However, the law (article 4) specifically excludes product patent protection for pharmaceuticals in addition to computer programs and, of

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84. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1992 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE DIVISION 8.

85. Patent Law No. 111.

86. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 125.

87. Draft patent law and accompanying explanatory statement submitted to Congress by Domingo F. Cavallo, Minister of Economy and Public Works and Services, and Avelino Jose Porto, Minister of Health and Social Action, on October 10, 1991.

course, items which violate Argentine law or morals. However, under the proposed new law, the restrictions on *product* patent protection on pharmaceuticals is being eliminated (by simply not explicitly mentioning it).[88] Given Argentina's long standing hostility to such a move, this represents a major change in thinking, though respected independent think tanks in Argentina such as the Fundacion de Investigaciones Economicas Latinoamericanas (FIEL) had already reached similar recommendations based on an economic analysis.[89] Specifically, since over ninety percent of pharmaceutical products sold in Argentina are off-patent, any price increases resulting from enhanced protection would only apply to a small fraction of the products on the market.

The present law provides for patent protection for up to fifteen years (no extension) while design patents are good for five years with the possibility of two to five year extensions. The new law is proposing an increase to twenty years from the date of filing.

Another aspect of the Argentine law that has been criticized[90] was the provision (article 47) whereby a patent lapses if not worked within two years from the date of issuance, or if there is more than a two year interruption in working the patent. This was not in conformity with Article 5A(3) and (4) of the Paris Convention, and as a result of the proposed new law (Article 46) provides for compulsory licenses only after three years following patent issuance or four years after filing where the invention has not been exploited (barring force majeure) and no serious effort has been made to exploit it. Nevertheless, the proposed law goes on to suggest that compulsory licenses will be granted when there is an abuse of market position or price discrimination that could itself lead to abuse. It is also unclear as to whether parallel imports would be permitted, a particular concern in the light of developments concerning Mercosur. On a positive note, the proposed law contains "pipeline" protection (Article 101) for patent applications that are covered under the proposed law but not under the existing law provided they are submitted within a year of the effectiveness of the proposed law and that exploitation of the invention or importation on a commercial scale has not begun.

A further area of criticism of the present law has been in the area of remedies and their enforcement. Specifically, the present law does not allow for preliminary injunctions in infringement cases, the burden of proof lies with the infringed party and remedies include only a maximum criminal sentence of one to six months, and a fine of 500 pesos (US$500). While the contours of the proposed new law still must await its passage and the promulgation of the companion regulations, the proposed law

88. Process pharmaceutical patents are already available but this provides very little protection since pharmaceutical products can be manufactured in many different ways that such protection can be circumvented.

89. FIEL, PROTECCION EN LOS DOS DERECHOS DE PROPRIEDAD INTELLECTUAL - EL CASO DE LA INDUSTRIA FARMACEUTICA EN LA ARGENTINA, (1990).

90. INTELLECTUAL PROPERTY RIGHTS, *supra* note 32, at 126-7.

does include (Article 76) a modest increase in penalty from six months to three years incarceration in addition to an unspecified level of fine.[91]

Finally, although Argentina is a signatory to the Patent Cooperative Treaty (PCT), the treaty has not been ratified and thus has no effect in Argentina.

It is worth noting that neither the existing or proposed law provides any protection for trade secrets, nor for mask works. However, trade secrets and know-how are recognized as property rights under article 2312 of the Civil Code and are in theory protected under article 156 of the Penal Code.

Argentina registers both trademarks and service marks, and trademark registration is valid for ten years and renewable for additional ten year periods, though violations are subject to imprisonment of one month to one year and a fine also of 500 pesos.

B. *Copyright*

The protection of copyrights in Argentina is based on Law 11,723 enacted on September 23, 1933 and since amended, supplemented by special laws, and clarified in case law, remains in effect.[92] Argentina acceded to the Buenos Aires Convention in 1950, the Universal Copyright Convention in 1958, the Berne Convention in 1967 (the 1948 Brussels text but not the 1971 Berne text), the Geneva Phonograms Convention in 1973, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations in 1992.[93]

Article 1 of the Copyright Act covers writings of any nature or length; dramatic works, cinematographic, choreographic and pantomime works; drawings, paintings and works of sculpture; works of architecture and of art or sciences applied to commerce or industry; printed matter, plan and maps; plastic works, photographs, engravings and phonograms; and all scientific, literary, artistic or educational productions regardless of medium.[94] To be copyrightable, the work must contain a minimum amount of originality and novelty, and be expressed in a material form which can be perceived by others.[95] Excluded from coverage are computer programs, though the National Registry of Copyright has accepted applications to register computer programs, as well as compilations and databases which tend to be granted protection under case law though two bills are now pending in Congress which would include protection for computer

91. In addition, the administrative machinery that is responsible for the examination and granting of patent applications needs to be substantially improved.

92. MELVILLE B. NIMMER AND PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE §1, at 8 (1992).

93. For a detailed evaluation of the Argentine Copyright Law, see IIPA, *supra* note 80, at 21-30.

94. NIMMER, *supra* note 92, §2(2) at 20.

95. *Id.* § 2(2) at 10-11.

programs.[96]

> Foreign works are eligible for protection in Argentina as long as the author belongs to a country which recognizes copyright and the author of the foreign work meets any formalities of the country of origin. Such unilateral protection provides full protection to works published in the United States after 1933 as long as those U.S. works comply with U.S. formalities.[97]

Article 2 of the Copyright Act provides for the exclusive rights of publication, public performance, translation, adaptation and reproduction. But the definition of public performance refers only to the radio telephonic transmission, cinematographic exhibitions, television transmissions, or any other method of mechanical reproduction of any literary or outside work but does not include any express provision for communication to the public by wire.

With respect to duration, the Copyright Act provides for protection for the life of the author plus his heirs for fifty years (Article 2), a "normal" period by comparative standards, but photographic works receive only twenty years while cinematographic works only thirty years (Article 34).

Article 57 requires publishers of works to register and deposit copies of their works at the Argentine National Copyright Registry within three months of the date of publication, or face a fine and suspension of the author's economic rights (Article 63).

With respect to enforcement, the Copyright Act (Articles 72, 73 and 75) provides for preliminary injunctions and confiscation of infringing works as well as criminal sanctions involving imprisonment from between one month to one year, and a fine of 1,000 pesos. Estimates of U.S. trade losses due to piracy of motion pictures, sound recordings and musical compositions in Argentina are estimated at US$43.6 million[98] involving primarily computer software, video, cable and audio-cassette piracy.

Thus, while Argentina has a long record of IP protection in the copyright area, its legislation should be brought more up to date (in line with the 1971 text of the Berne Convention) to include provision for the coverage of computer programs, compilations and databases, right of public performance to include retransmission by wire, protection against the parallel importation of works, and enactment of stiffer fines.

VIII. CONCLUSIONS

Any cost benefit analysis of the merits of strengthening IP protection must necessarily be country specific though a broad range of factors on both sides of the argument can be identified. On the cost side, developing

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96. *Id.* § 2(3)(b) at 22.
97. IIPA, *supra* note 80, at 24.
98. *Id.* at 22.

countries might anticipate increased outflows of royalty payments on patent licenses for the patents on products which have not yet expired and formerly pirated copyright works, some displacement of local "pirates", and the somewhat remote risk of abuse of market power by virtue of granting of foreign "monopolies". These monopolies, in the absence of compulsory licensing following the expiration of "grace" periods, might lead to higher domestic prices to segments of the local population. The importance of these factors would vary from country to country, but should be the subject of further empirical research.

On the benefit side, evidence suggests that there is a causal connection between levels of investment including licensing of technology, particularly for industries with high R&D costs such as pharmaceuticals, and adequate IP protection. Furthermore, this should lead, in the case of patents, trademarks and trade secrets, to greater confidence by domestic producers that their own R&D efforts would not be lost through infringement. Indeed, in the course of the Uruguay Round talks over the past six years, many developing countries have come to recognize the benefits of increased IP protection for their own economic self-interest. The case of copyright laws is less clear, though by and large, the three countries examined have been more forthcoming in copyright protection given their long established literary traditions. Nevertheless, in the newer areas such as protection for computer programs, external pressure has been required to achieve improved results.

Applying this broad framework to Mexico, Chile and Argentina, all of which are highly indebted but have either completed (Mexico, Chile) or are in the process of completing (Argentina) major economic adjustment efforts that, amongst other things, involve a liberalization of the trade and investment regime, can help explain the recent IP initiative. Thus, in the final analysis, it is probably the "marriage of convenience" between trade and investment reform on the one hand and IP protection on the other, that has had the greatest impact on the IP reform in the three countries.

Specifically, Mexico's desire to enter into a NAFTA agreement with the U.S. and Canada, with the obvious benefit that would entail, was a contributing factor in encouraging adoption of the very "modern" IP law in Mexico in 1991. Chile, and to a lesser extent Argentina, have similar long-term objectives (though for Argentina this may be done in the context of the Mercosur). Moreover, all three countries have been responding to bilateral pressure from the U.S. as part of its "Special 301" initiative.

In the short run, the direct impact of such new legislation (depending, of course, on the extent to which it is enforced) may entail some increased outflows of payments for IP benefits perhaps partially compensated by increased investment flows. However, the recent inclusion of pharmaceutical protection in the laws of Chile, unlike Mexico and Argentina (proposed), would probably not have significant implications for domestic prices particularly in the short run since patents will be enforced only for products not currently manufactured (no "pipeline" protection)

and prices of imitation products produced by local companies in developing countries are sometimes higher than the price of the original product produced by foreign companies. Finally, benefits should also accrue to consumers in the form of higher quality products based on tightened certification requirements.

Nevertheless, in the medium-term, multilateral solutions under a TRIPs agreement as part of the Uruguay Round appear to show the greatest prospect for sustainability in that they provide a forum for developing countries to offer concessions in some areas that have significant financial and balance of payments implications (such as enhanced IP protection) though accompanied by benefits domestically as well, in exchange for concessions by developed countries such as in agriculture, textiles etc. which would provide compensatory export revenue potential for developing countries. Though bilateral pressure, particularly from the U.S., has clearly accelerated the process of IP reform in these countries, a multilateral framework is far more likely to yield long-term benefits to all parties.

In any event, the optimal policy package may be for developing countries to strengthen IP protection while simultaneously reducing other barriers to competition that relate to the non-technical aspects of competitive advantage which would include further liberalization of trade regimes and focussing on antitrust implications of licensing technology. Finally, for such new laws to achieve the results that were originally intended, they will have to be vigorously enforced with appropriate penalties which in turn would require judicial reform in many developing countries including better court administration, reform of procedural and civil codes, and more relevant training for lawyers and judges.

COMMENT

Concealing Justices or Concealing Injustice?: Colombia's Secret Courts

MICHAEL R. PAHL*

I. INTRODUCTION

The recent escape of Pablo Escobar, head of the Medellin drug cartel, from his luxury "maximum security" jail represents another sad chapter in the long history of a criminal justice system in crisis. For decades, judges have been threatened or bribed into compliance with the demands of criminals from both left and right. Further, Columbia's antiquated criminal justice system, with little emphasis placed on criminal investigation, has produced one of the highest impunity rates in the world.[1]

Colombia desperately needs to reform its criminal justice system. The existing judicial crisis is an abdication of the state's fundamental and primordial function—to protect its citizens from a Hobbesian state of war.[2] Without an adequate criminal justice system, Colombia will remain one of the world's most violent democracies, unable to achieve what Alexis de Toqueville called in Democracy in America the "great aim of justice . . . to substitute laws for the idea of violence."

Fortunately, Colombia is a country ripe for reform. In 1991, Colombia ratified a new constitution, affecting numerous areas of Colombian political life. The rights of indigenous peoples have been recognized, and important human rights reforms have been adopted.[3] Equally important, the new constitution promotes pluralistic participation in political life by eliminating the power-sharing agreement between the two main political parties. This agreement was adopted in the mid-1950s in order to end the decade-long civil war known as "la violencia" in which an estimated

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1. *See* Gabriel Gutierrez Tovar, *Reflexiones sobre la Impunidad*, in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD 225 (Hector Peña Diaz, ed.,1991).

2. *See* Armando Borrero, *Constitucion y Orden Publico*, 13 REVISTA FORO 34 (1990).

3. *See generally* CONST. COLOM. arts. 11-94.

200,000 Colombians were killed.[4] As a result, former leftist guerrillas and other traditionally marginalized and powerless groups[5]—workers, peasants, and indigenous peoples—have played an active role in the new government. The 1991 Constitution is thus seen by many as a political and social revolution, a commendable exercise in the re-creation of constitutional democracy in a country long bled and drained by civil strife.[6]

In 1991, Colombia enacted important changes in its criminal justice system. One of the most interesting changes was the creation of a secret court system for drug and terrorism cases. The hope is that judges who are granted anonymity by having their identities concealed will be protected from threats or assassination, enabling the judges to bring criminals to justice. The crucial question, however, is whether these secret courts can achieve the twin goals of protecting the judiciary and increasing the conviction rate, without sacrificing the rights of criminal defendants which are guaranteed in the new constitution.

The short answer is that these rights are sacrificed. Although the secret court system has increased the conviction rate and provided some protection to the judiciary, it has done so at the cost of basic rights of the criminal defendant. Moreover, the secret court system has been used for political ends, punishing legitimate political protesters as "terrorists." As such, the secret court system should be abandoned, as the pursuit of justice is too precious a jewel to be bought with authoritarian coin.

II. BLOOD ON THE ROBE: COLOMBIA'S EMBATTLED JUDICIARY

Violence against the Colombian judiciary has been pervasive, persistent, and deadly. According to a recent study[7] by the Andean Commission of Jurists, a human rights group in Bogotá, an average of twenty-five judges and lawyers have been assassinated or have been attacked each year since 1979. In all, 515 cases of violence against judges and lawyers have been reported between 1979 and 1991, 329 of which have been murders or attempts to murder.[8] And, of the approximately 4,500 Colom-

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4. *In Colombia, Killings Just Go On and On*, WALL ST. J., Nov. 17, 1987, at 10.

5. *See* HERNANDO VALENCIA VILLA, THE GRAMMAR OF WAR 1-2 (1986).

6. For a less sanguine view, see William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. OF MIAMI INTER-AM L. REV. 39, 85-86 (Fall 1991) ("It is unclear whether the invocation of popular sovereignty to legitimate the reform process in Bogotá reflects a genuine public demand for a new set of societal rules and institutions. Instead, it could simply be another episode of constitutional reform serving as a shield to protect the less populist and shorter term political goals of those in power. Legally, it makes no difference. The Colombian electorate indicated by plebiscite that they wanted a chance to vote for a constitutional assembly, and did just that by conferring their primary sovereignty upon a popularly elected body").

7. For a thorough description and in-depth analysis of the violence facing Colombia's judiciary, see Guido Bonilla & Alejandro Valencia Villa, *Justice for Justice: Violence Against Judges and Lawyers in Colombia: 1979-1991* (1992) (on file at the Andean Commission of Jurists: Colombian Section, Bogotá, Colombia).

8. COLOMBIAN SECTION, ANDEAN COMMISSION OF JURISTS, JUSTICIA PARA LA JUSTICIA: VI-

bian judges, roughly 1,600 have received threats to themselves or their families.[9]

Although Colombia is popularly perceived as a country besieged by drug-related violence (narcoterrorism), it is important to note that judicial intimidation has been neither exclusively nor primarily linked to drugtrafficking.[10] According to the Andean Commission study, of the 240 cases of violence against the judiciary with a known author or cause, eighty have been linked to paramilitary groups, fifty-eight to drugtraffickers, forty-eight to state agents (including the military and the police), thirty-two to guerrillas, and twenty-two to other factors.[11] Corruption and violence, like blood, runs thick in Colombia, and few have kept their hands clean.

Violence to the judiciary is as widespread as it is deadly. No sector of the judicial hierarchy has been untouched. While criminal trial court judges are the most effected, Justice Ministers and Supreme Court justices have been threatened or killed as well. Perhaps the most graphic and poignant illustration of Colombia's embattled judiciary occurred in November of 1985, when M-19, a leftist group, stormed the Palace of Justice, taking twenty-four Supreme Court justices hostage. The government refused to negotiate, choosing a military option instead. In the ensuing raid, involving over twenty-eight hours of intense fighting and the bombing of the Palace of Justice by the government, thirty-five members of M-19, several dozen hostages, a dozen soldiers, and eleven Supreme Court justices were killed.[12]

What has happened to those who kill members of the judiciary? Virtually nothing. According to the Andean Commission study, in over eighty percent of the cases reported, there is no evidence of criminal action being carried out.[13] As a result, criminal sentences have been imposed in only 2.1 percent of cases.[14] The inability of the justice system to investigate and prosecute the crimes committed against it reflects the dire situation of Colombia's judiciary: how can the judiciary protect others if it cannot protect itself?

III. JUECES SIN ROSTRO: FACELESS JUDGES

In response to this drastic situation, Colombia has created a special jurisdiction of secret courts with *jueces sin rostro*, or faceless judges, to protect the judiciary. These courts are known as Courts of Public Order, dealing with crimes disproportionately affecting the public order, such as

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OLENCIA CONTRA JUECES Y ABOGADOS EN COLOMBIA: 1979-1991, 1992 [hereinafter JUSTICIA].

9. *Colombia Struggles to Seal Its Judges' Armor*, N.Y. TIMES, Oct. 13, 1991, at 10.

10. JUSTICIA, *supra* note 8.

11. *Id.*

12. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COLOMBIA: A COUNTRY STUDY 298 (Dennis M. Hanratty & Sandra W. Meditz eds., 1990).

13. JUSTICIA, *supra* note 8.

14. *Id.*

drug trafficking, terrorism, kidnapping, and the illegal transportation of arms.

These special courts were established in 1984 for drug cases and were expanded in 1987 to include "political crimes" — rebellion, sedition, and other acts of violence committed with criminal intent.[15] In November of 1991, the current President Cesar Gaviria unified both systems under the Statute for the Defense of Justice. These courts were originally implemented under state of siege legislation and considered "exceptional", as a scaffolding to be used only until a solid structure of criminal justice could be constructed. However, with the passage of the New Code of Criminal Procedure on November 30, 1991, they became a permanent fixture in Columbia's criminal justice infrastructure[16]

Eighty-two judges (of which forty-nine are trial judges and thirty-three are investigative judges) currently sit in these secret courts. All communication is done either through two-way mirrors using Darth Vadaresque voice distorters, or in writing. Witness statements are authenticated by a complex system of fingerprints in lieu of signatures. Opinions are unsigned, with only a judicial number affixed to the decision. The identity of police agents and informants may be kept secret as well.[17] As a final protection, a chief of security is assigned to each court to coordinate threat assessments, and the judges are provided with armed escorts to and from work.

The Colombian secret court system, with no known analogue in the world, has received accolades from the international law enforcement community, who finally see Colombia cracking down on drugs.[18] Indeed, in terms of effective law enforcement, the secret court system is to be commended. After all, the conviction rate is estimated to have jumped from approximately 10% in ordinary courts to 70% in the secret courts.[19] And, according to the Andean Commission study, threats against judges have dropped dramatically, by eighty percent. But at what cost?

IV. PROCEDURAL NIGHTMARES IN COLOMBIA'S SECRET COURTS

The high conviction rate in these special courts should come as no surprise, given the absence of basic constitutionally-protected procedural rights that criminal defendants in the United States take for granted. If one were to red-line the U.S. Bill of Rights and drastically reduce or eliminate many protections for criminal defendants, the result would be similar to the situation facing the accused in Colombia's secret courts.

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15. AMERICAS WATCH, POLITICAL MURDER & REFORM IN COLOMBIA: THE VIOLENCE CONTINUES 98 (1992).

16. *Id.*

17. COLOMBIAN SECTION, ANDEAN COMMISSION OF JURISTS, UNA JUSTICIA AMENZADA: COMMENTARIOS AL ESTATUTO PARA LA DEFENSA DE LA JUSTICIA 2 (1991).

18. *See* Steven Flanders & Ana Maria Salazar, *Colombia's Purgatory*, N.Y.L.J. 2 (Jan. 21, 1992).

19. *Colombia Struggles to Seal Its Judges' Armor*, *supra* note 9.

For example, the criminal defendant in the Colombian secret court system has no 8th Amendment right to a bail hearing.[20] Under U.S. law, by contrast, pre-trial detention through the denial of bail is considered the exception rather than the rule. The Framers of the U.S. Constitution prohibited the imposition of excessive bail in the Bill of Rights to prevent the recurrence of the harsh treatment suffered by colonists in British jails during the Colonial Period.[21] From this constitutional basis, U.S. law has developed to the point that in the federal system, pre-trial detention is only available if the government can demonstrate by clear and convincing evidence that the defendant is likely to flee the jurisdiction, or that no release conditions "will reasonably assure. . .the safety of any other person and the community."[22]

In Colombia's secret courts, by contrast, the accused must suffer the indignity of incarceration, separated from family and friends, with absolutely no burden on the government to justify this deprivation of liberty. More importantly, the absence of 8th Amendment protection may seriously prejudice the criminal defendant in the preparation of his defense. Stuck in jail with no hope of release, the criminal defendant may find it difficult to contact and prepare witnesses for his defense, or confer with his lawyer at his leisure.

At the trial stage the treatment of the accused turns from bad to worse. Secret proceedings eliminate the 6th Amendment right to a public trial,[23] ensuring that violations of constitutional rights are concealed from

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20. *See* COLUMBIA SECTION, ANDEAN COMMISSON OF JURISTS, SISTEMA JUDICIAL Y DERECHOS HUMANOS EN COLOMBIA 43 (1990).

21. Ironically, the "bail clause [adopted by the Framers] was lifted with slight changes from the English Bill of Rights Act." *See* Carlson v. Landon, 342 U.S. 524, 545 (1952), *reh. den.*, 343 U.S. 988. The right to a bail hearing, however, has not been extended to state prosecutions. *See* Collins v. Johnston, 237 U.S. 502, 59 L.Ed. 1071, 35 S.Ct. 649 (1915).

22. *See* United States v. Salerno, 481 U.S. 739, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Expressed in a different vein, the Federal Bail Reform Act, codified in 18 U.S.C.S § 3142(f), requires that a judge inclined in the first instance towards the release of an accused on his own recognizance or upon unsecured bond.

23. The Sixth Amendment right to a public trial has been made applicable to the States through the Fourteenth Amendment. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Exceptions to a right to the public trial have been held permissible in certain exceptional circumstances. As stated by the Supreme Court, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). As an illustration, *see* United States v. Hernadez, 608 F.2d 741 (9th Cir. 1979) (exclusion of spectators allowed when witness had been subjected to pretrial threats); United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969) (exclusion of spectators who threatened witness at trial); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir. 1975), *cert. denied*, 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (exclusion of spectators during the testimony of an undercover agent engaged in ongoing investigations proper); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965) (exclusion of spectators permissible when necessary to preserve order in the courtroom).

public scrutiny.[24] On the political level, secret courts also militate against the openness in government reflected in the new Columbian Constitution. Through public trials, citizens may learn about the machinery of their government, acquiring confidence that the judicial process is not being used for abusive ends.[25] Further, as a practical matter, public trials make the proceedings known to possible witnesses who otherwise might be unknown to the parties.[26]

The system of secret witnesses, violates the 6th Amendment right to confront witnesses, one of the most valuable defense tools. In these courts, defense lawyers may neither question witnesses before trial nor cross-examine them at trial. This prevents the defense from calling a witness' demeanor, credibility, or bias into question (although a conviction cannot be based on a single secret testimony). As a result, a central principle of the U.S. trial system—that truth is best revealed through an adversarial process in which both parties present their case, with witnesses subject to cross-examination and evidence subject to contradiction—is severely curtailed.

Colombians may be familiar with the adversary system in action through the popular television show "*Las Leyes de Los Angeles*," or "L.A. Law." But the adversary system's utility extends far beyond making exciting television episodes. Rather, on the philosophical level, the adversary system attempts to check what Weber called the modern state's monopoly on force[27]—its power to investigate, prosecute, and punish—through giving the defense the opportunity to put into question the government's evidence and witnesses. Regrettably, in Colombia's secret courts, there is little to control the Leviathan. The danger is that the judge will consider only the evidence and uncontroverted testimony proferred by the government; tipping the scales of justice in their favor.

The criminal defendant is further prejudiced by the massive system of protection provided for government informants. The cornucopia of benefits provided those who collaborate with the authorities by testifying against the accused include pecuniary compensation, a new identity, exit from the country, immediate conditional release, and exemption from punishment.[28] While the Federal Witness Protection Program[29] in the

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24. *See* In re Oliver, *supra* note 23 ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarcy's abuse of the *lettre de cachet*. . .[W]hatever other benefits the guarantee to the accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution").

25. *See* Ravinsky v. McKaskle, 772 F.2d 197 (5th Cir. 1984).

26. *See* 6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn rev. 1976).

27. For a discussion of the moral justification of the modern state's monopoly on force, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 89-119 (1974).

28. *Id.*

29. The Federal Witness Protection Program, established by Congress in 1984, autho-

U.S. provides similar benefits and protections,[30] there is a crucial difference.

In the U.S. system, the witness must still be present at trial. This subjects the witness to the moral constraint of lying in front of the accused, and, more importantly, to the cross-examination of an aggressive defense attorney.[31] Further, having the witness present at trial tends to assure testimonial trustworthiness by inducing fear that any false testimony will be detected.[32] The danger in Colombia is that the government, in its zealous pursuit of convictions, may play the role of the serpent in the Garden of Eden—tempting witnesses and informants to lie with the fruit of governmental goodies—unchecked by the power of a probing and thorough cross-examination.

In short, the Colombian secret court system amounts to a criminal defendant's nightmare. Colombia has its Gabriel Garcia Marquez to describe the *realismo fantastico* of Colombian life; what it lacks is a Franz Kafka to describe the judicial absurdity its many Joseph K's face in the secret court system. Criminal defendants are being convicted by unknown witnesses paid by the state, absent from the trial, and immune from cross-examination. Further, if the judge decides the evidence must be kept secret, the "judicial decision" may be a mere piece of paper, containing only the judge's number. The concept of feeling guilty without knowing why may make for interesting existential novels, but it has no place in criminal law—especially when one is being punished for crimes that carry penalties of up to thirty years in jail. A system that cripples a solid criminal defense, and leaves judicial decisions unexplained, reflects a process of judgment more reminiscent of the Medieval Inquisition than of modern standards of criminal justice.[33] The "miracle" of the Colombian secret court system is not that seventy percent of those accused are convicted, but that thirty percent go free.

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rizes the Attorney General to take such action as he deems "necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person [or an immediate family member or close associate], including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists." 18 U.S.C. § 3521(b)(1).

30. Among these include new identification documents, housing, moving expenses, employment assistance, and "a payment to meet basic living expenses." 18 U.S.C. § 3521(b)(1)(A)-(H).

31. For a sample of an effective cross-examination, *see* Frank Rubino's cross-examination of Federal Witness Protection Program participant Danny Martinez in *Dealing with the Devil (and Lesser Imps)*, 20 Crim. Prac. Man. (BNA) 464 (Sept. 30, 1992); *see also Expert can show how Sweet Cooperating Witness's Deal Is*, 5 Crim. Prac. Man. (BNA) 465 (Oct. 2, 1991).

32. *See* WIGMORE, *supra* note 26.

33. *See* Alejandro David Aponte, *Como matar a la justicia en la tarea de defenderla: "Estatuto para la defensa de la justicia,"* 11 ANALISIS POLITICO 77 (1990).

V. CASTING THE CRIMINAL NET: POLITICAL ABUSE OF COLOMBIA'S SECRET COURTS

The lack of procedural rights in the secret court system are problematic; however, its potential for political abuse is even more concerning. Latin America is notorious for its *caudillos* or dictators of both left and right, from Castro to Pinochet, who have abused power to strengthen their regimes while violating basic human rights. Accordingly, any increase in the state's power, particularly the removal from the public eye of the state's power to discipline and punish, must be subject to the strictest scrutiny.

The Colombian government has claimed that the purpose of the secret court system is two-fold and inter-related: to protect judges and to combat terrorism. While fighting terrorism is a valid and essential goal, a wide criminal net can be cast over that rubric. The danger is that the Colombian government, seeking a surcease of the violence that has made Colombia one of the world's most violent democracies, will use an over-expansive definition of "terrorist" to mask prosecutions against political dissidents or to cover daily arbitrary violations of human rights.[34]

The problem of interpretation is essentially one of language. As Anglo-American legal theorists from H.L.A. Hart to Albert Saks have noted, restricting legal terms to one fixed literal meaning is difficult, for words are inherently ambiguous. Continental deconstructionists such as Michel Foucault or Jacques Derrida would go even further, claiming that the meaning of the written word eludes even the author herself, and must be interpreted in a sociological and contextual framework.

While this presents problems for a judge seeking the "literal" meaning of a statute, it can have grave consequences when applied to a slippery term such as "terrorist" or as manipulable a phrase as "acts of rebellion or sedition." For, as Montesquieu sagely noted, ". . .not defining what is meant by treason is enough for the government to become despotic."

Who has been caught in Colombia's terrorist net? Human rights advocates report that student protestors, peasants, and others critical of the present regime have been convicted in these secret courts for legitimate acts of social protest.[35] Indeed, the irony is that a liberal interpretation of the phrase "acts of rebellion or sedition" could be applied to the very grass-roots student movement which led to the important constitutional reforms of 1991. An over-broad net has been cast in the fight against narcoterrorism as well, dragging in both major drugtraffickers such as Pablo Escobar, with millions to spend in his defense, and mere consumers

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34. *See* Fernando Velasquez V., EL ESTATUTO PARA LA DEFENSA DE LA JUSTICIA: UN RETORNO A LA INQUISITION!, 51 NUEVO FORO PENAL 4 (1991).

35. Interview with Alejandro David Aponte, Professor of Law, Universidad de Los Andes, at the Andean Commission of Jurists, Bogotá, Colombia, Aug. 18, 1992.

too poor to afford their own lawyer.[36]

By punishing acts of political protest, the Colombian government is frustrating the purpose of the new constitution, which seeks dialogue for the resolution of social conflict. Voices muted in the past by a *de jure* power-sharing arrangement between the two main political parties and *de facto* class stratification, will remain silent if the government continues to abuse the secret courts for political ends. Further, expanding the criminal net in this manner violates a time-honored and internationally-respected principle of criminal law, *nulla poena sin lege* ("no punishment without a crime"). According to this doctrine, criminal statutes are to be narrowly construed as a check on the government's power, to protect citizens from arbitrary and unanticipated incarceration. No one should be judged and punished without conforming to the preexisting law for which he is punished.[37] Regrettably, such is the situation facing these erstwhile political protestors turned "terrorists" by the secret court system.

VI. CONCLUSION

The Colombian secret court system has been a moderate success. Supporters of the system point to the degree of security it provides to a beleaguered judiciary, helping to remove the death sentence under which many judicial officials worked in the past. They note as well that criminal convictions have risen dramatically, helping to lower the high impunity rate plaguing the country.

Supporters of the system fail to recognize two critical points, however. The first is the limited efficacy of the protection the system provides. The second is the tremendous cost to personal liberty and political participation of the secret court system.

The argument that the secret court system provides greater protection for judges is specious in several aspects. First of all, security is limited to a minority of judges—*jueces sin rostro* and Supreme Court justices—while the great majority of judicial functionaries go unprotected. Even the protected judicial elite is only safe from 9 to 5. Further, it appears that the efficacy of the secret court system will be of limited duration. As recently as September 19, 1992, a *jueza sin rostro* and her three bodyguards were assassinated in front of her home by *sicarios* in Medellin.[38] As critics had predicted, the veil of secrecy has been irreparably torn. Finally, the decrease in violence to the judiciary should not be too quickly accredited to the secret court system. The ban on extradition of Colombian nationals and the inclusion of leftist groups in the new consti-

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36. *Id.*; *see also* Aponte, *supra* note 33, at 79.

37. In the United States, constitutional due process requires that the statute which defines a substantive crime must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

38. *Asesinada una jueza sin rostro*, EL TIEMPO, Sept. 19, 1992, at 1A; *see also Narcos amenazan a jueces sin rostro*, EL TIEMPO, June 6, 1992, at 1A.

tution have played an equally important role in the recent cessation of attacks on the judiciary.

The second argument in favor of the secret court system, that it has increased the conviction rate, is equally troubling. High conviction rates can always be achieved by clipping the rights of criminal defendants. Furthermore, troublesome political "enemies" can always be more easily dealt with through the long arm of the law rather than through the long and arduous process of negotiation and dialogue which, democracy demands. Colombia is a country seeking to create itself anew, to secure a respite from the violence which has plagued the country for years on end. The 1991 Constitution, promoting pluralistic participation in political life and the laying down of arms, is a step in the right direction. The secret court system, with its clipping of procedural rights and criminalization of dissent—is not. Justice, like the beautiful emeralds for which Colombia is renowned, is too precious a jewel to be bought with authoritarian coin.

STUDENT COMMENTS

The Denationalization of Kazakhstan

I. EMERGENCE OF A MARKET ECONOMY

Privatizing state property represents a critical yet unfinished step in building prosperous market economies throughout the former Soviet Union. As one Russian scholar noted, with the collapse of the former Soviet economy the most effective tool to combat economic decline is to privatize inefficient, state-dominated enterprises which will in turn nurture a growing private sector.[1] Kazakhstan, the second largest of the former Soviet Republics, was the first to legislate privatization laws and establish a State committee to oversee the privatization program.[2] Last May, Kazakhstan's President Nursultan Nazarbayev released his "Strategy for Kazakhstan's Emergence and Development as a Sovereign State" setting forth his plan for moving Kazakhstan toward a market economy. In the strategy, Nazarbayev identified as the Republic's primary task removal of property from State control through privatization. The strategy established a three-stage economic plan with its main objectives to: 1) build a socially-oriented market economy; 2) saturate the domestic consumer market; 3) introduce a national currency; 4) attract and efficiently utilize foreign investment; and 5) enter the world market independently.[3]

The first stage called for normalization of the consumer market and overall economic stabilization over a three year period by denationalizing and privatizing, as well as developing, a sufficient supply of consumer goods.[4] The second stage involved the development of the necessary infrastructure by modernizing transportation and telecommunication networks, and forming adequate commodity, currency, capital, labor, stock and intellectual property markets.[5] At the third stage, Kazakhstan would

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1. *See* Leonid Grigoriev, *The Former Soviet Republics Confront Privatization: A Russian Analysis*, Heritage Found. Rep., No. 859, Oct. 11, 1991.

2. *Kazakhstan: Economic and Demographic Structure*, Euromoney Supplement, Feb. 15, 1992, *available in* Reuter Textline, at 26, Feb. 15, 1992.

3. *See* B. Kizmenko, *Kazakhstan: Nazarbayev Outlines Economic Targets*, EKONOMIKA I ZHIZN, June 7, 1992, *available in* Novecon-Reuter Textline, at 5, June 11, 1992.

4. *Id.*

5. *Id.*

move towards an open economy to gain a firm position in international trade and join the industrially developed countries of the world.[6]

The Kazakh privatization laws, as reflected by the above strategy, incorporate a strong State role providing for a more managed transition to a market economy. In all, Kazakh privatization efforts offer an interesting alternative to the widely publicized privatization legislation of Russia. This paper introduces the denationalization and privatization laws and policies, and analyzes the impact they will have on establishing the basis for a market economy and attracting foreign investment.

II. DENATIONALIZATION AND PRIVATIZATION LEGISLATION

In June of 1991, the Kazakh Supreme Soviet adopted the Law on Denationalization and Privatization (Denationalization Law).[7] The law set forth the legal basis, rules and procedures for the transformation of state-owned property to private property and the creation of conditions favorable to the emergence of a socially oriented market economy. The same month, President Nursultan Nazarbayev approved the first Privatization Program that established the details for implementing the denationalization efforts.[8] President Nazarbayev subsequently amended the Denationalization Law by issuing a decree aimed at speeding up the conversion of Kazakhstan to a market economy.[9] This decree, entitled "On Measures to Enhance the Activity Towards Denationalization and Privatization of Property in Material Production Industries" (Privatization Decree),[10] was passed April 29, 1992. An additional decree, entitled "On Urgent Measures for the Privatization of Procurement, Processing and Servicing Enterprises of the Agroindustrial Complex" (Agro Measures) was recently adopted to similarly provide for the rapid privatization of agricultural enterprises.[11]

These legislative acts set forth the basic laws governing the denationalization and privatization of Kazakh state property. The Denationalization Law establishes the critical basis for Republic jurisdiction to govern those lands, enterprises, and objects on its territory.[12] This law as

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6. *Id.*

7. *Kazakh Parliament Approves Privatization Law* (Alma-Ata Kazakh Radio Network, June 24, 1991) (transcript in FBIS-SOV-91-124, June 27, 1991, at 74).

8. *See* V. Ardayev, *Privatization Program Approved*, IZVESTIA, Sept. 19, 1991, at 2, *available in* SovData DiaLine-BizEkon News, Sept. 19, 1991.

9. *Kazakhstan: Nazarbayev Issues Privatization Decree*, IZVESTIA, May 5, 1992, at 1, *available in* Reuter Textline, May 5, 1992.

10. *Kazakhstan Begins Privatization* (Official Kremlin Int'l News Broadcast) (transcript in Federal News Service, May 5, 1992).

11. *Kazakhstan: Privatization Begins in Agroindustrial Complex*, ECOTASS, Apr. 13, 1992, *available in* Reuter Textline, Apr. 13, 1992.

12. Law of the Kazakh Soviet Socialist Republic 'On Denationalization and Privatization,' KAZAKHSTANSKAYA PRAVDA, Aug. 1, 1992, at 2, *translated in* NAT'L TECHNICAL INFO.

amended establishes a unified system of managing public property with a centralized State commission to oversee privatization transactions.[13] The Privatization Decree calls for the implementation of large-scale, regulated 'destatization and privatization' programs of enterprises and outlines the procedure for doing so. The Privatization Decree gives the government majority control over all enterprises and limits foreign investment. The Agro Measures emphasize privatizing agricultural industries under collective management.

In addition to these broad measures, the Privatization Program adopted annually by the Kazakh Cabinet of Ministers, and approved by the Kazakh Supreme Soviet and President, sets forth the details and the areas of emphasis for the denationalization and privatization of Kazakh property.[14]

III. GOVERNING BODIES

Three state and quasi-state administrative bodies directly govern privatization efforts: the Kazakh State Committee for State Property, commissions for privatization, and privatization bureaus. The Denationalization Law establishes the Kazakh State Committee for State Property (Committee) as the main regulating body that represents the interests of the State in relations involving Kazakh property.[15] The Committee has the authority to convey the rights of possession, use and management of Kazakh property to other state organs and economic interests within and outside the territory of the Republic.[16] Committee decisions bind on all levels of state administration.[17]

Commissions for privatization empowered by the Denationalization Law, govern enterprise and property privatization. These commissions are organized by the seller of a state-owned object once the decision is made to denationalize and privatize.[18] The commission, made up of property owner representatives, the Local Soviet of People's Deputies, enterprise administrations, organs for state statistics, trade union organizations and other specialists, is the organizing body that develops and submits to the seller a plan for privatization.[19]

SERVICE, U.S. DEPT OF COMM., KAZAKH LAW ON DENATIONALIZATION AND PRIVATIZATION OF 4/91, PB92-966801, [hereinafter Denationalization Law].

13. *Passions Over Property Will be Restrained*, EKONOMIKA I ZHIZN, No. 28, at 2, *available in* SovData DiaLine-BizEkon News, July 11, 1992. The Denationalization Law originally divided Republic and Communal property. Subsequent legislation abolished this division to eliminate the conflict between republic and municipal government bodies over privatized industries. *Id.*

14. Denationalization Law, *supra* note 12, art. 11.

15. *Id.* art. 8.1.

16. *Id.* art. 8.2.

17. *Id.* art. 8.3.

18. *Id.* art. 13.1.

19. *Id.*

However, specifically regarding industrial enterprises, the Privatization Decree amends this process bypassing all-together the commissions for privatization. Privatization bureaus now organize the task of denationalizing industrial enterprises.[20] The privatization bureaus, established across the Republic, act as mediators between State property owners and potential buyers.[21] These self-financed bureaus examine the privatization project and recommend a particular legal structure to the enterprise. The Privatization Decree legislates that the bureaus shall emphasize and recommend the creation of open joint-stock companies.

IV. OBJECTS OF DENATIONALIZATION

The Denationalization Law describes entities and properties of the State as state-owned objects. As specifically provided in the Law, state-owned objects subject to privatization include: all branches of the production and nonproduction spheres, enterprises, associations, organizations, and their structural units and subdivisions, objects of cultural and domestic significance, the social sphere, state housing fund, and other valuable objects.[22] Pursuant to the Denationalization Law, the Committee, in conjunction with the Local Soviets of People's Deputies, designate those enterprises not subject to privatization for reasons of defense, security, social development, environmental protection, popular health, cultural interests or the necessary state monopolization of certain activities.[23] The Denationalization Law further prohibits the privatization of objects that are the exclusive property of the Kazakh SSR, a categorization primarily applicable to land.[24] Although the Denationalization Law establishes the right to acquire land for life for agricultural and housing purposes, the Privatization Program specifically limits agricultural enterprises and farms to obtaining land by perpetual tenure or lease.[25]

Pursuant to the Privatization Decree, the privatization process envisages a first phase of privatizing shops and other trade organizations, catering centers, services, municipal facilities, small factories, small building organizations, public transportation system, farms and housing run by the State.[26] Large and medium state industries will be converted to joint stock companies or business partnerships. Those objects not subject to denationalization and privatization during the first phase include major medical and educational institutions, communication facilities, power plants, telecommunications and radio stations, railways and civil aviation.

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20. *See Decree Outlines Procedures in Kazakhstan*, PRIVATIZATION INT'L, June 1992.

21. *See* Tatyana Jurbenko, *Kazakhstan Boosts Privatization of State Property*, THE TELEGRAPH AGENCY OF THE SOVIET UNION (TASS), Apr. 29, 1992.

22. Denationalization Law, *supra* note 12, art. 9.

23. *Id.* art. 9.3.

24. Olga Babiy, *Privatization Programme Published in Kazakhstan*, THE TELEGRAPH AGENCY OF THE SOVIET UNION (TASS) Sept. 17, 1991.

25. *Id.*

26. *Decree Outlines Procedures in Kazakhstan*, *supra* note 20.

V. PARTIES TO THE PRIVATIZATION TRANSACTION

Of specific importance to the development of a market economy is the recognition of individual citizens and legal entities as lawful parties in the privatization process. The Denationalization Law identifies Kazakh citizens, citizens of other republics, citizens of foreign states, and individuals without citizenship as well as Kazakh legal entities as parties eligible to participate in the denationalization and privatization of Kazakh state property.[27] However, the Privatization Decree, recently limited the role of foreign buyers. The Decree specifically states that during "the transitional period of the formation of a market economy, the taking of state enterprises and organizations into private ownership by persons who are not citizens of the Republic of Kazakhstan is not permitted."[28] Thus, foreign investors may participate in privatized property, but only on a minor level during the transitional periods.

The Privatization Program recognizes residents of Kazakhstan as its citizens except for chronic alcoholics, drug users and people repeatedly charged with serious crimes.[29] The Denationalization Law specifically recognizes that labor collectives or a group of workers of a state enterprise, may be a collective buyer in purchasing state enterprises.[30] Finally, the seller is the State in all cases, with the Committee representing State property and Local Soviets of People's Deputies representing communal property.[31] It is unsure what role a new centralized State commission will play in eliminating the division of State property. With regard to purchase transactions, either party may utilize and enter agreements with intermediaries operating as brokers for the purchase or sale of State property.[32]

Kazakh law loosely governs the relationships between buyer and seller and among collective purchasers. The terms and relations negotiated between parties, are recognized as legally binding. For example, a labor collective, including the rights and liabilities of its individuals, is governed by regulations adopted at its general meeting. These regulations, as negotiated between the members of the collective, are recognized as binding on the members' business relations.

However, the Denationalization Law allocates liability between buyers and sellers. The seller bears the burden of liability for property conditions and warranties made by the seller until the time the buyer assumes the right of possession, use, or control or the right of ownership in the privatized property. The liability then shifts to the buyer, although prop-

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27. Denationalization Law, *supra* note 12, art. 10.1.

28. *Privatization Decree in Kazakhstan Sharply Limits Role of Foreigners Acquiring Enterprises*, 3 RUSSIA AND COMMONWEALTH BUS. L. REP., No. 4, June 12, 1992.

29. Babiy, *supra* note 24.

30. Denationalization Law, *supra* note 12, art. 10.2.

31. *Id.* art. 10.3.

32. *Id.* art. 10.4.

erty damage may occur prior to making the final payment pursuant under an installment plan.[33] The buyer is liable for damages to the seller if the buyer fails to pay for the acquired object.

VI. PRIVATIZATION PROCESS

Pursuant to the Denationalization Law, the privatization process commences with the filing of an application for privatization with the Committee.[34] Privatization may take the form of: leases, concessions, auctions, tenders, competitive bids, joint stock companies, and a privatization voucher system. Any labor collective or group of workers, citizens, legal entities, seller or organ of state government may initiate the denationalization process by filing the application. Upon filing, a seller then has thirty days to decide and inform the buyer of whether the enterprise will denationalize.[35] The decision must be based on standards established by legislation. Those State-owned objects selected for denationalization and privatization, however, shall start privatization efforts irrespective of applications filed by prospective purchasers.[36] Pursuant to the Privatization Decree, industrial enterprises shall mainly take the form of open joint-stock companies. The Decree, in efforts to streamline and speed up privatization of industries, implements a three-step process to transform state enterprises into other ownership formats. First, the enterprise files an application and has it registered. This allows superior state bodies of management to immediately release control of the enterprise.[37] Second, a privatization bureau examines the project in terms of its financial and economic activity, values its assets and drafts the required papers. The bureau then recommends a specific ownership arrangement for the enterprise. Third, the enterprise employees have one week to discuss the proposal, develop and adopt the charter and other foundation documents.

A. *Coupons*

In order to create equal economic conditions among the Kazakh citizens, the Denationalization Law originally called for the use of privatization coupons as a means of payment for acquiring State property.[38] Citizens would receive coupons based on work tenure and the number of minor children. The coupon system was originally conceived as the best method for the Republic since it would allow all adult citizens to participate in privatization. The first Privatization Program based its privatization process on a coupon system. However, just last October, the Kazakh government announced that it will not introduce privatization vouchers in the Republic. The Government explained that giving a voucher to

33. *Id.* art. 28.2.
34. *Id.* art. 12.
35. *Id.* art. 12.3.
36. *Id.* art. 12.2.
37. *See* Jurbenko, *supra* note 21.
38. Denationalization Law, *supra* note 12, art. 16.

every citizen of Kazakhstan is not "expedient."[39] The government further clarified that it will continue to privatize its own way by starting with small businesses and finishing with selling shares of medium-size and large business.[40]

B. *Payment Restrictions*

The Denationalization Law recognizes lawful payment for purchases of State-owned property if made with legal tender of the former Soviet Union, with privatization coupons, or with any funds not the property of the State. There are no restrictions on making payment with borrowed funds or on an installment plan. With regards to installment payments, the State as the seller shall establish the amount of the down payment, the length of the payment period, the conditions and procedure for making the payments, and the liability for the satisfaction and timeliness of the payments.[41] Finally, the Denationalization Law mandates that installment payments may not extend beyond ten years and that a minimum down payment must equal at least twenty percent of the purchase price.

C. *Valuation of Properties*

Under the Denationalization Law, the privatization commission set up by the seller recommends an appropriate value and selling price for the privatized object. The commission evaluates the privatized enterprises by considering several factors including, but not limited to: 1) the basis of the residual value; 2) actual prices; 3) demand for the product or serves; 4) competitiveness; 5) profitability; 6) development prospects for the enterprise; and 7) global market prices.[42] However, pursuant to the Privatization Decree specifically relating to industrial enterprises, the independent privatization bureaus conduct economic and financial analyses, value the enterprise's assets and prepare the required documents for privatized industrial enterprises. It is assumed that the state enterprises will be evaluated based on the same criteria and factors as set out in the Denationalization Law.

D. *Registration and Transformation Documents*

The Denationalization Law requires the buyer and seller to enter a contract addressing specific provisions before making final payment to acquire the property. The required provisions include clauses generally required to find a valid transfer of property under common law. The contract must stipulate: 1) the transfer of rights of ownership, use, and

39. *Kazakhstan: Government Decides Against Issuing Privatization Vouchers*, NEZAVISIMAYA GAZETA, Oct. 23, 1992, at 4, *available in* Reuter Textline-Novecon, Oct. 23, 1992.

40. *Id.*

41. Denationalization Law, *supra* note 12, art 15.4.

42. *Id.* art. 17.2.

control of the property to the buyer; 2) the composition and price of the acquired property; and 3) the funding sources and method of and time tables for payment.[43] The contract may further stipulate commitments binding upon the buyer or other provisions regulating production performance, including: 1) the maintenance of production profile and volume and type of products produced or services rendered; 2) the delivery of products to particular consumers; 3) price setting conditions or maximum price levels; 4) environmental protection measures; 5) preservation or development of new work locations; 6) maintenance of existing procedures; and 7) standards for the use of production objects and social infrastructure. Once a buyer has paid in full for the privatized State property, the seller issues a State document certifying the transfer of ownership rights.[44] The new owner thus becomes the legal successor to the property rights, responsibilities, financial and other obligations of the privatized State enterprise.[45] The Denationalization Law mandates that the new owner must meet the provisions of the purchasing contract and any other conditions stipulated in a competitive bid, failure to do so shall incur property liability and loss of ownership rights as enforced by the State.[46]

VII. GENERAL TOOLS FOR DENATIONALIZATION AND PRIVATIZATION

A. *Bidding*

Sales sometimes involve competitive bidding.[47] Pursuant to the Denationalization Law, competitive bidding is used when the seller places certain conditions on a purchaser's bid to meet demands for further use of the property.[48] For instance, a seller may require that the new owner accept certain commitments of delivery of products to particular consumers. The procedures for conducting the competitive bidding are established by the privatization commission and approved by the State Committee.[49] The passage of the Privatization Decree presumes that the privatization bureaus shall establish this process for State enterprises.

B. *Auction*

State property is auctioned the sole purpose of obtaining the highest price. Sellers organize the auctions and either the privatization commission, privatization bureau for industrial enterprise, or an intermediary may implement them. An initial designate price is set at the State-owned object's estimated value and the final price may not fall lower than fifteen

43. *Id.* art. 27.2.
44. *Id.* art. 27.1.
45. *Id.* art. 30.1.
46. *Id.* art. 30.
47. *Id.* art. 23.1.
48. *Id.* art. 23.
49. *Id.* art. 23.3.

percent below the initial price.[50] The State Committee determines and approves the auction procedures.

VIII. STATE-OWNED ENTERPRISES

A. *Joint Stock Companies*

The Denationalization Law provides for the transformation of State enterprises into joint-stock companies or other forms of ownership association or partnership. Joint-stock companies are required to grant a priority right to workers and pensioners to acquire up to twenty percent of the overall number of shares with a discount of thirty percent of the nominal value of the shares.[51] These advantages for workers of a State joint-stock company are only available for three months once the sale of shares has commenced and such shares may not be resold for two years.[52]

Pursuant to the Privatization Decree with a joint-stock company, investment vouchers (differing from privatization coupons) are distributed free of charge to the work force and pensioners of the enterprise based upon the worker's term of service.[53] Under the Decree, such vouchers will total a maximum of twenty-five percent of all stock of the enterprise.[54] The twenty-five percent employee investment stock shall consist of fifteen percent common stock and ten percent preferred. The first management officers of the privatized enterprise will be retained on a contractual basis and shall receive investment vouchers five times the amount given to an average employee.[55] All employee stock is nontransferable and may only be passed to legal successors. An enterprise is prohibited from purchasing stock from a dismissed employee for five years from date of termination. The remaining seventy-five percent of stock may be distributed as follows: five percent sold at par value to members of the worker collective, ten percent at par value or stock market rate to business relations, ten percent to foreign shareholders or "outside" investors, and a controlling interest of not less than thirty-one percent of stock that remains with the State through the State Property Committee and its territorial branches.[56] Thus as noted above, even as the Kazakh government moves towards a market economy, this decree establishes that a State monopoly on control over enterprises is preserved to guide State enterprises through the transition period.[57]

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50. *Id.* art. 23.4.
51. *Id.* art. 25.2.
52. *Id.* art. 25.4.
53. *See* Jurbenko, *supra* note 21; *Kazakhstan Begins Privatization*, *supra* note 10.
54. *See Kazakhstan Begins Privatization*, *supra* note 10.
55. *Id.*
56. *Id.*
57. *Id.*

B. *Leasing*

Since privatization of land is prohibited, most enterprises must operate on leased land. The land code of the Republic of Kazakhstan governs property law regarding leases. The Kazakh law "On Leasing" governs State enterprises released for leasing.[58]

C. *Labor Collectives or Other Collective Enterprises*

Labor collectives may purchase the property of the State enterprise. Similar to partnership agreements, the regulations adopted by the labor collective govern distribution of property interests between collective members.

The Denationalization Law provides the following advantages as incentives to organizing labor collectives for purchasing privatized enterprises: 1) a preferential right to purchase the enterprise, 2) the right to use some of the enterprise consumption funds to purchase State property conditioned upon the consent of the majority of members of the labor collective, 3) a discount of thirty percent of the cost of the acquired property for autonomously financed enterprises and up to fifty percent discount for budget enterprises and organizations and those enterprises planned to operate at loss, and 4) profits from the enterprise may be used to meet part of the purchase price.[59] These sums are then deducted from the taxable profit. Finally, with regards to any other property interests such as social infrastructures that existed on the books of a State enterprise, such objects may be transferred free of charge to the labor collective that has acquired it.[60] The State entity as the seller makes this transfer decision.

IX. AGRICULTURAL

The Denationalization Law originally recognized the right of a purchaser to acquire land for the purpose of operating an agricultural enterprise. Subsequent legislation now mandates that land will remain the property of the State under the Privatization Program and farmers will gain land rights through leases. The Agro Measures, like the Privatization Decree, were implemented to clarify and speed up denationalization efforts in the agroindustrial enterprises. This decree sets the goal of privatizing all agroindustrial enterprises of Kazakhstan by March 1, 1993.[61] In addition, those companies showing little profit or losing money are targeted for privatization during the first half of the current year. This is recognized as an effort to bring such enterprises up to efficient operating

58. Denationalization Law, *supra* note 12, art. 18.
59. *Id.* art. 25.1.
60. *Id.* art. 25.5.
61. *See Kazakhstan: Privatization Begins in Agroindustrial Complex*, *supra* note 11.

standards by ensuring their rapid privatization. The methods available for privatizing agricultural enterprises include joint stock companies and associations of farmer economies.[62] The preference emphasized by the Agro Decree is the creation of collective forms of management. By the first half of 1992, 217 collective State farms were privatized, in addition to another 556 individual farms.[63] Also developing out of the privatization of agroindustry are farming associations. To date farmers have formed over thirty farming associations.

X. URBAN PROPERTIES

Kazakh citizens may purchase State and departmental apartments and houses using privatization coupons or other means of payment. A system of privatization vouchers was introduced by the Denationalization Law to distribute housing interests. As a result of these efforts, 305,000 apartments were privatized during the first half of 1992, with nearly 70,000 families now owning their apartments.[64] These apartments were privatized free of charge or purchased with special coupons. Besides individual housing ownership, cooperatives may organize to operate the State residential buildings. Such cooperatives are formed by purchasing more than half of the apartments in a State residential building.[65] Kazakhstan plans to maintain rapid housing privatization with the goal of privatizing its housing sector by mid-1993.[66]

XI. DISPUTE RESOLUTION

The Denationalization Law recognizes certain governing bodies responsible for the resolution of any disputes arising during the course of denationalization and privatization. With a dispute between the Kazakh state organs and the former USSR and other former Union Republics, Kazakh and USSR legislation shall govern. Any disputes arising between Kazakh state organs and legal entities or citizens are governed by the courts, the State arbitration board, or with agreement of both parties, a court of arbitration.[67] Citizens, legal entities and the State are protected from losses caused from the denationalization and privatization process by holding parties guilty of illegal actions responsible for the full reim-

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62. *See id.* (First Deputy Chief of the Alta-Ata Regional Agricultural Agency Fyodor Ashenbrenner commenting on the preference to create collective forms of management instead of small private enterprises between raw material producers and processing enterprises for this will help prevent monopolization).

63. *Kazakhstan: Agricultural Privatization - Report*, ZEMLYA I LYUDI, Oct. 15, 1992, at 3, *available in* Novecon-Reuter Textline, Oct. 15, 1992.

64. *See* O. Stefashin, *Kazakhstan: Privatization of Apartments - Report*, IZVESTIA, Sept. 3, 1992, at 1, *available in* Novecon-Reuter Textline, Sept. 4, 1992.

65. Denationalization Law, *supra* note 12, art. 22.2.

66. *See* Gail Fitzer, *Kazakhstan Signs Deal with Rothschild Inc.*, Reuters (Money Report), BC cycle, May 21, 1992.

67. Denationalization Law, *supra* note 12, art. 31.1.

bursement of such losses.[68] In all cases, decisions of officials and organs responsible for denationalization and privatization measures are appealable in court. The same applies for unreasonable delays for considering applications for privatization.

XII. LABOR LAW

The Denationalization Law sets forth regulations mandating that the administration of the State enterprise must observe provisions of previous collective and labor agreements during the period of implementation of privatization.[69] A new collective agreement must be signed between the new owner and the labor collective within six months from the time of transfer of ownership rights.[70] This new agreement is the basic normative act regulating relations between the owner, workers and trade union organization of the enterprise. A collective agreement is required for all enterprises regardless of their form of ownership. Lastly, Kazakh labor legislation restricts the termination of workers by the new owner or administration of the privatized enterprise. Any discharged worker terminated within six months of the time of transfer of ownership rights, use, control or possession of the property, is awarded severance pay in the amount of three months' average earnings.[71]

XIII. CONCLUSION

From a legal standpoint, the current Kazakh laws governing privatization provides only the most basic groundwork to facilitate the Republic's transition to a market economy. The laws recognize freedom of contract and individual property rights. Most importantly, business relations are left to the parties involved and the State will respect and enforce such agreements. As already illustrated in the discussion above, decrees amending prior legislation are published on a regular basis as the Kazakh government strives to maintain stability, respond to Republic interests and provide the greatest impetus for reform. Although these laws thus far are inadequate to address all issues, they certainly establish a solid framework with which to convert State property into private hands. The Republic is probably better off enacting these general guidelines for privatization than to enact elaborate codes which could all too quickly become unenforceable due to incompatible rigid legal structures in a rapidly evolving market and social structure.

The one weakness of the privatization laws is the prohibition on private ownership of land. Anglo-american law was built on property law. Property law, based on the alienability of land, provides the basis for con-

68. *Id.* art. 31.2.
69. *Id.* art. 29.2.
70. *Id.* art. 29.3.
71. *Id.* art. 29.4.

tract and tort law. Without this basic foundation, Kazakhstan will be forced to develop a body of law based on property rights to enterprises and objects merely attached to the land. This may not create a great obstacle, though the same Anglo-american law may prove to be inapplicable for borrowing as the Republic continues to look to the west for consultation and guidance.[72] As such, provisions restricting alienability of property interests and the flat prohibition on land ownership will most likely dampen market forces. However, given the condition of the Republic, such laws should provide for the development of a strong internal market, albeit at a slower pace, without the shocks experienced by her northern neighbor.

Kazakhstan consists largely of rural communities. The Republic lacks adequate infrastructure, not to mention communication facilities. While the Republic may be lacking in industrial development, it is rich in natural resources and abundant agricultural land. Due to these conditions specific to Kazakhstan, the government is wise in maintaining a controlling interest in privatized enterprises and restricting land ownership to leasing interests only. Otherwise, without the basic infrastructure or consumer market available for reinvestment, foreign investors could easily enter the Kazakh market and merely export their rich mineral resources. A market must be created in Kazakhstan before the government can withdraw completely to private interests. Maintaining government involvement should only help emerging enterprises in their establishment as viable industries.

What are the prospects for successful privatization in Kazakhstan? Foreign observers project that Kazakhstan may experience a slower path towards a market economy through 1992 and 1993 as a result of its most recent legislation restricting foreign investment. Fear of unemployment, lack of an overall legal infrastructure and an aversion to challenge vested industrial interests are all reasons noted as factors handicapping the privatization process in the near future.[73] More importantly, however, the Kazakh laws appear to have popular support and they continue to create a politically stable investment environment. Political stability is one of the largest determining factors influencing foreign investment decisions in the Republics of the former Soviet Union. As it is, Kazakhstan is one of the most publicly stable Republics of the former Soviet Union[74] and is expected to remain the most stable of the Central Asian States which will maintain foreign investor confidence. As such, political stability will play an important role in Kazakhstan's privatization efforts and more importantly, influence foreign attitudes towards Kazakh investment. Western observers believe that Kazakhstan will attract foreign investments due to

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72. "Kazakhstan: Government Concludes Contract with U.S. Legal Firm," ECOTASS, in *Reuter Textline*, May 18, 1992. (making Kazakhstan the first republic to hire the services of a western lawfirm as counsel on reform measures).

73. Denis McCauley & Adam Dixon, *Business Outlook: CIS Kazakhstan*, BUS. E. EUR., Sept. 21, 1992.

74. *See Kazakhstan: Economic and Demographic Structure*, *supra* note 2.

its political stability, vast mineral resources, realistic economic policy of its leadership and Nazarbayev's personality.[75]

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75. *See French Investors are Offered Easy Terms by N. Nazarbayev*, IZVESTIA, No. 214, Sept. 25, 1992 at 1, *available in* SovData Dialine - BizEkon News, Sept. 25, 1992.

The Kurdish Crisis: An International Incident Study

I. INTRODUCTION

In the past two years, the leading democratic nations increasingly feel it was their responsibility to interfere in what has traditionally been considered the internal matters of other states. The largest intervention since the Gulf War occurred when western states intervened in Iraq on behalf of the Kurds. The western democracies, encouraged by nations from all corners of the world, provided humanitarian relief and a degree of security so that the Kurdish refugees could come down from the mountains on the border of Iraq, where starvation and intense cold threatened their survival. Invoking the doctrine of humanitarian intervention, these states acted to protect international peace and security but met resistance in the fundamental notion of state sovereignty.

As a term of art, *humanitarian intervention* traditionally refers to interference on behalf of nationals or inhabitants of foreign countries "in cases where a State maltreats its subjects in a manner which shocks the conscience of mankind."[1] The doctrine purports to allow a state to intervene in what would otherwise be an unlawful action, but, as its definition suggests, the doctrine is full of ambiguities. The approximately ten major actions ventured under the modern doctrine have met with a mixed response from the international community.[2] Scholars have been no less divided over whether, and in what circumstances, the United Nations Charter authorizes humanitarian intervention.[3]

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1. Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 332 (1967) (quoting H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 32 (1950)).

2. The modern doctrine predates the U.N. Charter and is usually traced from the early nineteenth century. W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 179 (Richard B. Lillich ed., 1973). For an analysis of humanitarian interventions undertaken in the past, see Reisman and McDougal, *supra*, at 178-87; *see also* Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321 (1989).

3. Some scholars believe that Article 2(4) of the United Nations Charter, which renounces "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations," and Article 2(7), which prohibits intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any state," forbid humanitarian intervention entirely. *See, e.g.*, Michael Akehurst, *Humanitarian Intervention*, *in* INTERVENTION IN WORLD POLITICS 98, 104-08 (Hedley Bull ed., 1984) (arguing that humanitarian intervention is illegal); Thomas B. Franck and Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

Others believe that humanitarian intervention is well-grounded in the United Nations

Following the Gulf War, Iraqi treatment of the Kurds aroused, for the first time, a substantial world response. Some countries suggested the removal of Saddam Hussein, while others offered proposals for restructuring Iraq, including a plan to create autonomous enclaves for the Kurds. Indeed, the Kurdish situation provided the international community with a prime opportunity to expand the contingencies for and the scope of humanitarian intervention.

Despite calls for a New World Order and an increased interest in human rights, however, the world's most effective actors failed to broaden the doctrine and sustained only a moderate intervention on behalf of the oppressed Kurds. This result may be understandable given the exigent political realities. The United States was reluctant to become involved in what the President viewed as a potential military "quagmire." The English, who led the European Community's response, expressed a greater willingness to interfere but could not act without U.S. support. The United Nations had among its members too many potential targets for accusations of human rights violations to take aggressive action. The weak response was particularly unfortunate, however, because the need for aid was so extreme and clear-cut. Moreover, respect for human dignity and minimal human rights standards demanded more aggressive action.

A brief look at the history of the Kurdish community in Iraq and the history of international interference on their behalf provides a background for an evaluation of the humanitarian intervention which has occurred in Iraq since the Gulf War.

II. HISTORY OF THE KURDS

A. *The Iraqi Population*

Although Saddam Hussein and his government publicly maintain that Iraq is one nation and all of its inhabitants Iraqis, Iraq is a country of deeply divided ethnic and religious sects. Approximately 73.5 percent of Iraq's population is Arab, a figure which perhaps belies Hussein's claim to be the leader of the Arab world, as in few other Arab states is there

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Charter and subsequent conventions. These scholars argue that the use of force for the purposes of humanitarian intervention not only is consistent with the Charter's purpose of protecting human rights but also does not fall within Article 2(4)'s proscription against the use of force. They note further that an important qualification is added to Article 2(7), which excepts enforcement measures under Chapter VII, including action with respect to threats to the international peace and security. The latter exception may be particularly relevant to interventions in matters of human rights, because the international community has increasingly recognized the interdependence of the preservation of international peace and security and the protection of fundamental human rights. *See* Lillich, *supra* note 1, at 326-38; Reisman & McDougal, *supra* note 2, at 171-72, 177.

Several scholars have suggested criteria by which one may evaluate the legitimacy of a particular humanitarian intervention. *See* Lillich, *supra* note 1, at 347-51; Reisman & McDougal, *supra* note 2, at 187.

such a high percentage of non-Arabs.[4] The Kurdish population constitutes Iraq's second most prominent ethnic group, the nation's largest ethnic minority.[5] The Iraqi Kurds have historically been an economically independent, non-Arabic speaking minority group in Iraq, who are linked by cultural, religious, community, and linguistic ties which have stretched over thousands of years.[6] They survive a history of persecution. Mass murders and forced exodus have been the preferred methods of Saddam Hussein and his government of Sunni Arab elites for dealing with this ethnic minority. And the Kurdish struggle for autonomy has been punctuated by little international effort on their behalf. The Kurds have never received more than partial recognition, from the time of the creation of the modern state of Iraq to the present.

B. *Early Hope for Self-determination*

At the close of the First World War, the fall of the Ottoman Empire offered the Kurds their first great hope of self-determination in this century. The Allied powers envisaged a partitioned Turkey, from which they hoped to carve an independent Kurdish state to be called Kurdistan. President Woodrow Wilson expressed this hope in point twelve of his Fourteen Point Program for World Peace which stated that non-Turkish minorities of the Ottoman Empire should be "assured of an absolute unmolested opportunity of autonomous development."[7]

The Treaty of Sevres, the 1920 armistice agreement between Great Britain and Turkey, stated that a commission of Allied appointees would "prepare for local autonomy in those regions where the Kurdish element is preponderant."[8] In 1923, however, the British were forced to renegotiate the terms of the Treaty at Lausanne, after Kemal Ataturk, the

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4. SIMON HENDERSON, INSTANT EMPIRE: SADDAM HUSSEIN'S AMBITION FOR IRAQ 26-27 (1991).

5. Although the Iraqi government refuses to provide population figures, one 1989 estimate places the Kurdish population at 21.6 percent. *Id.* at 26.

6. In the Middle East, the Kurds constitute the fourth largest ethnic group, behind the Arabs, Persians, and Turks, boasting a population of approximately twenty to twenty-five million. They are thought to descend from Indo-European tribes who settled many years ago in the mountains of what is now broadly referred to as Kurdistan. Although the Kurds speak a common language, no universal written and spoken form of Kurdish has evolved, and numerous dialects make communication between some groups difficult. Religiously, approximately eighty-five percent of the Kurds are Sunni Muslim, and strong religious loyalties exist among them. They have traditionally been a tribal and agricultural people and remain so to some extent today. Vast differences exist, however, between the often nomadic, mountain Kurds and the urban Kurds, a group that generally views traditional Kurdish tribalism as backwards. In any case, tradition remains a large part of Kurdish life, and the Kurds struggle to protect a unique cultural identity. DAVID MCDOWELL, THE KURDS: THE MINORITY RIGHTS GROUP REPORT NO. 23, 5-9 (1985).

7. Woodrow Wilson, *Address on the Conditions of Peace Delivered at a Joint Session of the Two Houses of Congress* (Jan. 8, 1918), *in* PRESIDENT WILSON'S FOREIGN POLICY: MESSAGES, ADDRESSES, PAPERS 361-62 (James B. Scott ed., 1918).

8. Treaty of Sèvres, Aug. 20, 1920, art. 62, *quoted in* MCDOWELL, *supra* note 6, at 11.

founder of modern Turkey, came to power. By the terms of the Treaty of Lausanne, the Kurdish population was split largely among the five countries of Turkey, Iran, Iraq, Syria, and the U.S.S.R., reminiscent of their split before the war, between the Persian and Ottoman Empires. After some debate, the League of Nations ultimately awarded the Kurdish area of Mosul and the oil-rich land surrounding it to Great Britain.[9]

Choosing to rule the Kurdish region under its control through traditional Kurdish leadership, the British government appointed Shaikh Mahmud Barzinji to act as governor in 1919. Barzinji was immediately challenged, however, by other tribal leaders who resented their loss of power. Troubled by Turkish attempts to re-establish control of the area by inciting Kurdish rebellion and unable to work through tribal leadership, the British ultimately incorporated the Kurdish area into Iraq under a provisional Kurdish administration. In doing so, the British defined the territory of the modern state of Iraq.[10]

C. *An Independent Iraq*

The British surrender of political control of Iraq in 1932 signalled the beginning of the oppression of the Kurds. The Arab leadership of Iraq had encouraged the British hope that the Kurds could be reconciled to incorporation with Arab Iraq, by promising to honor the League of Nations stipulations to the grant of Mosul to Iraq in March 1925—that Kurdish should be the official language of the area and that the Kurds should be placed in administrative and educational positions in their region. Neither pledge, however, was recorded in the Anglo-Iraqi treaty of 1930 (implemented in 1932) that granted Iraq its independence.[11]

The weakening of British ties, the lack of written guarantees in the Anglo-Iraqi treaty, and the failure of the Iraqi government to take any steps to implement its oral promises caused the Kurds to fear for their status in Iraq. Led first by Shaikh Mahmud Barzinji and later by Mulla Mustaf Barzani, the Kurds revolted. The series of revolts have alternately been termed tribal uprisings and the first popular movement for an independent Kurdistan.[12] Kurdish rebellions in the North did not die down until the Second World War, at which time the Kurds became increasingly integrated with Arab society.[13]

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9. The entire area of the modern state of Iraq was placed by League of Nations mandate under British control. HENDERSON, *supra* note 4, at 16.

10. MARION FAROUK-SLUGLETT & PETER SLUGLETT, IRAQ SINCE 1958: FROM REVOLUTION TO DICTATORSHIP 14-15, 24-25 (1987).

11. *Id.* at 26-27.

12. *See* PHEBE MARR, THE MODERN HISTORY OF IRAQ 43, 51, 54 (1985); FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 26-29. *Compare* Sa'ad N. Jawad, *The Kurdish Problem in Iraq, in* THE INTEGRATION OF MODERN IRAQ 171 (Abbas Kelidar ed., 1979) [hereinafter Jawad, *Kurdish Problem*] *with* MCDOWELL, *supra* note 6, at 19.

13. MARR, *supra* note 12, at 146.

D. *The Beginnings of the Republic of Iraq*

The next stage of Kurdish history began with the establishment of the Republic of Iraq in July of 1958, when a group called the Free Officers overthrew the Iraqi monarchy and established Abdel Karim Qasim as prime minister. The Kurds initially greeted the revolution with enthusiasm, expecting the new government to be more sympathetic to their cause. Mulla Mustaf Barzani, the Kurdish leader who enjoyed a larger tribal following than any other tribal leader, came back from twelve years of exile and quickly took an active role in the Kurdish Democratic Party (K.D.P.), the urban, professional wing of the Kurdish movement founded by Barzani and others in 1946. A new constitution promised the Kurds equality with the Arabs.[14]

When Barzani and the Kurds demanded further government concessions and became increasingly aligned with Communist forces, however, Qasim began to realize the extent of the Kurdish goals. He responded to Barzani's demands with the first major offensive of what became a lengthy conflict. Qasim's bombing of Barzan, Barzani's homeland, and his banning of the K.D.P. escalated the situation to an all-out war for Kurdish autonomy and, ostensibly, for democracy in Iraq. Barzani's rebels made formidable opponents. Gaining widespread support from other anti-republic Kurdish tribal leaders, they adopted guerilla tactics and maintained mountain strong-holds.[15]

Plagued by defections to the Kurdish army, betrayal by officials in his own government, and scant support left in the Army, Qasim was defeated in 1963 by the Ba'ths, who were in turn overthrown that same year by Abdel Saslam Arif. Despite periodic cease-fires, the Kurds remained in a state of civil war for nearly the entire period between 1961 and 1968, as successive military governments attacked the Kurdish uprisings. These governments called the Kurdish revolts attempts to achieve separation and sought a military solution to the problem. In doing so, they failed to acknowledge the experience, magnetism, and military experience of Barzani and the tenacity of the Kurdish fighting forces known as *pesh merga*, or "those who face death."[16]

E. *The Ba'th Rise to Power*

1. The March Manifesto

When the Ba'th party regained power in July 1968, they intended to find a more permanent solution to the Kurdish issue but were plagued by

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14. *Id.* at 176-77; MCDOWELL, *supra* note 6, at 19.

15. MARR, *supra* note 12, at 177-79; MCDOWELL, *supra* note 6, at 19-20; SA'AD JAWAD, IRAQ AND THE KURDISH QUESTION 324-31 (1981) [hereinafter JAWAD, KURDISH QUESTION]; Jawad, *Kurdish Problem*, *supra* note 12, at 175-76.

16. MCDOWELL, *supra* note 6, at 20; JAWAD, KURDISH QUESTION, *supra* note 15, at 51-52; Jawad, *Kurdish Problem*, *supra* note 12, at 177.

the obstacles familiar to previous regimes. Among the obstacles were the extensive following of Barzani, the Iraqi army's resistance to peaceful settlement, and public opinion in the Arab world that autonomy for the Kurds was equivalent to separation.[17]

Despite inflexibility on both sides, the government and the Kurds reached an agreement, in March of 1970, that recognized the Kurds as free and equal partners of the Arabs and promised them full recognition of their national autonomy within four years. The Manifesto granted the Kurds several specific rights, including government posts, economic concessions, and rights to use and be taught the Kurdish language. The enforcement of these rights, however, quickly became subject to disputes.[18]

International involvement intensified the problems between the Ba'th regime and the Kurds both during this period and later, because the Ba'ths resented interference in what they viewed as a sovereign matter.[19] Among the Kurds' supporters were the governments of Iran and Turkey, whose aid was granted contingent on understandings that the movement for Kurdish separatism would not be spread into their countries.[20] The Israelis also allegedly provided the Kurds with assistance.[21]

Foreign support, however, did not exist to liberate the Kurds but rather to encourage the Kurds to wage war against the Ba'ths, in order to neutralize the danger of the Iraqi regime in the Middle East.[22] The Kurds were repeatedly betrayed by temporary supporters. The Soviets, for example, after helping the Kurds negotiate the March Manifesto, allied themselves with the Iraqi government, whom they began supplying with arms.[23]

2. Autonomy Law and the Civil War of 1974-1975

The crisis culminated in 1974, when the Ba'th invited K.D.P. support of an Autonomy Law, to be announced March 11, 1974, and gave them fifteen days in which to respond in order to participate in the National Patriotic Front (N.P.F.). The Kurds found the law insufficient to meet their demands. They felt that they had not been provided with solid guarantees of meaningful participation in their government, they differed

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17. JAWAD, KURDISH QUESTION, *supra* note 15, at 331.

18. MCDOWELL, *supra* note 6, at 20-21; Jawad, *Kurdish Problem*, *supra* note 12, at 179-80.

19. Saddam Hussein, who became president in 1979 after rising to power through the Ba'th, commented: "Looking at it within its national framework, the Kurdish question is a purely internal matter which sometimes takes dubious forms because of the intrusion of foreign influences, and stands aggressively in the way of the national movement and struggle for the construction of a new society." Interview with Sakina al-Sadat, Egyptian journalist (Jan. 19, 1977), *in* SOCIAL AND FOREIGN AFFAIRS IN IRAQ 95 (Khalid Kishtainy trans., 1979).

20. MCDOWELL, *supra* note 6, at 20.

21. FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 104.

22. MCDOWELL, *supra* note 6, at 21; Jawad, *Kurdish Problem*, *supra* note 12, at 180-81.

23. JOHN BULLOCH & HARVEY MORRIS, SADDAM'S WAR: THE ORIGINS OF THE KUWAIT CONFLICT AND THE INTERNATIONAL RESPONSE 178 (1991) [hereinafter SADDAM'S WAR].

over the interpretation of the Manifesto and the extent of the government's efforts to implement it, and they disagreed with the government as to the extent of the Kurdish area, particularly concerning the city and environs of Kirkuk.[24]

Full-scale war soon developed, and by the end of the summer, the Iraqis controlled much of Kurdistan. Only when Iran increased aid to the Kurds, providing long-range heavy artillery support and perhaps even troops, did the Kurds stage a serious comeback.[25]

Kurdish prospects were soon thwarted, however. Arab governments brought the Shah of Iran and Iraqi Vice-President Saddam Hussein together in Algiers, and the two leaders reached a settlement. In return for a new delimitation of the Shatt al-Arab waterway at the deepest navigable channel, Iran sealed its borders to the Kurds and withdrew their field guns from Iraq. The Iranians then proceeded to threaten to join the Iraqis in a combined attack, if the Kurds did not accept the Agreement's terms.[26] After the Agreement, Mulla Mustaf Barzani went into exile, where he died.

Samir al-Khalil, in his book *Republic of Fear: The Politics of Modern Iraq*, describes what he views as a decline of the army under the second Ba'th regime, which evidenced itself in increasingly violent behavior.[27] A major escalation in violence against the Kurds was particularly evident towards the end of the civil war in 1974, when the principle function of the army was internal repression. In 1974 and 1975, the army napalmed and bombed Kurdish villages and districts systematically, leaving many thousands of civilians homeless. Al-Khalil describes the arrests, deportations, executions, assassinations, and public hangings to which the Kurds were subjected, including the summary execution of one thousand *pesh merga* fighters after they surrendered to government troops.[28]

3. The Resettlement Program and the Kurdish Refugees

The violence continued after the civil war in the form of continued, massive Kurdish resettlement conducted by the Iraqi army. The army

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24. FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 166-68; MCDOWELL, *supra* note 6, at 21-22. Both the Kurds and the government maintained that they were conforming to the March Manifesto. Jawad, *Kurdish Problem*, *supra* note 12, at 180. Estimates suggest, however, that the "autonomous region" designated by the Ba'ths excluded half of the area of Iraqi Kurdistan and that the provinces of Kirkuk were redrawn to ensure that the city had an Arab majority. Furthermore, a detailed study indicates that few of the benefits set forth in the Agreement were implemented. FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 188.

25. MCDOWELL, *supra* note 6, at 21-22.

26. FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 170.

27. In one 1969 incident, for instance, in the village of Dakan in Northern Iraq, sixty-seven women and children were knowingly burnt alive, while hiding in a cave which they had entered to seek protection from an artillery shelling. The incident was brought to the attention of the United Nations. SAMIR AL-KHALIL, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 22-23 (1989).

28. *Id.*

forced Kurdish inhabitants to new cities easily accessible to the Iraqi army and then to settlements nearer major Kurdish cities. Al-Khalil describes massive deportations to the southwestern desert region of Iraq, an area vastly different in climate than the hills of Kurdistan. Families were taken to the south by truck, to destinations where they were left, supplied only with a tent. The Ba'th relocated Kurds from the provinces of Diyala, Kirkuk, and Mosul.[29] Al-Khalil estimates that eighty-five percent of those who returned to Iraq on the strength of amnesty or because they were expelled by the Shah's army were sent to these camps.

Jalal Talabani, leader of the Patriotic Union of Kurdisan (P.U.K.), and others, say that the Iraqi army dynamited twenty-eight Kurdish cites and at least four thousand villages from 1974 to 1990, as part of "Saddam's plan to depopulate rural Kurdistan and relocate its people in the more easily controllable big cities."[30] Kurdish villages were reduced to rubble in Saddam's campaign, as the Iraqis forced evacuation and dynamited the remaining towns. Iraqi soldiers sealed off and guarded, at numerous checkpoints, what remained of the towns.[31] By demolishing villages along the borders of Iran and Turkey, the Iraqi government created a *cordon sanitaire* in those areas most susceptible to infiltration of aid from other countries.[32]

F. *The Iran-Iraq War*

The Algiers Agreement of 1975 not only led to the end of the Iraqi-Kurd civil war but also precipitated an eight-year war between the parties represented by the signatories. Iraq's *casus belli* was an alleged violation of the Algiers Agreement by the Khomeini regime and an allegation that Iraq had been forced to cede control of the Shatt al Arab waterway under duress.[33] After Saddam Hussein tore up the Algiers treaty in a symbolic gesture, the war started in September of 1980. For the Kurds, the war created yet another opportunity for rebellion. They maintained a revolt throughout the period with aid from Ayotollah Khomeini.[34]

Ultimately, a curtailed ability to obtain arms (in large part due to the U.S.-led Operation Staunch), the command of the Gulf sea lanes by American ships, and a collapse of morale after years of conflict forced Iran to accept United Nations Resolution 598 calling for a cease-fire. Although Iraq had accepted the agreement a year earlier, it sought to impose new conditions, delaying negotiations long enough for the Iraqi army

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29. *Id.* at 24; *see also* HENDERSON, *supra* note 4, at 199-200.

30. Michael Kelly, *Back to the Hills*, NEW REPUBLIC, June 3, 1991, at 23, 24.

31. *Id.* at 25.

32. FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 188.

33. The dispute over the waterway, however, went back hundreds of years to a dispute between the Persian and Ottoman Empires. See JOHN BULLOCH AND HARVEY MORRIS, THE GULF WAR 33-38 (1989), for a history of the conflict. [hereinafter GULF WAR].

34. SADDAM'S WAR, *supra* note 23, at 87-88.

to turn their arms on the Kurdish dissidents in the north.[35]

On July 19, 1988, the Iraqi army proceeded to drop poison gas on Kurdish villages, starting a campaign of bombing and forced exodus by which the government eliminated Kurdish resistance and forced one hundred thousand refugees into Turkey and Iran. Concerned with the Geneva cease-fire accords and anxious to do nothing to threaten negotiations, the West did not criticize Iraq's actions.[36] Nor did the United Nations publish details of the Kurdish incidents until negotiations were under way, after Saddam dropped his demands on Iran on the sixth of August.[37]

The campaign against the Kurds which followed the war had been foreshadowed by an incident which received widespread press coverage in March of 1988, when some five thousand Kurdish civilians were killed at Halabja. The deaths resulted from a gas attack which occurred immediately after the town switched hands, allowing Iranian television crews to capture the horrors.[38] The incident represented not only Iraq's first chemical attack against its own civilians but also the first recorded use of nerve gas. The international community, however, fell short of condemning Iraq at this time.

Two staffers sent by the U.S. Senate Foreign Relations Committee, Peter Galbreith and Christopher Van Hollen, went to Iraq and returned with reports of Iraq's use of chemical weapons to depopulate Kurdistan and relocate the population. Their report led to the introduction of the Prevention of Genocide Act 1988, which, despite unanimous Senate approval was deemed premature and counterproductive by the White House and ultimately failed.[39]

Britain attacked Iraq's policy of using chemical weapons but, like other Western states, preferred to maintain relations with Iraq, in what the government saw as its best means of wielding influence over future Iraqi behavior. The Soviet bloc made no comment on the events. At the United Nations, Saddam's half-brother succeeded in accumulating the votes necessary to remove Iraq from a list of persistent human rights offenders.[40]

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35. GULF WAR, *supra* note 33, at 258; SADDAM'S WAR, *supra* note 23, at 20.

36. Although George Shultz, in a meeting with Saddam's deputy prime minister, publicly condemned Iraq's actions, the nation's Middle East experts urged him to take a "less emotional position." He consequently approved a recommendation for an administrative policy opposed to sanctions against Iraq for the use of chemical weapons against the Kurds. ELAINE SCIOLINO, THE OUTLAW STATE: SADDAM HUSSEIN'S QUEST FOR POWER AND THE GULF CRISIS 171 (1991).

37. GULF WAR, *supra* note 33, at 259.

38. There is some debate as to whether the Iranians were also involved in the gassing, as two different types of gas were used. *Cf.* GULF WAR, *supra* note 33, at 262 *with* THE IRAN-IRAQ WAR: IMPACT AND IMPLICATIONS (Efraim Karsh ed., 1989). *See also* FAROUK-SLUGLETT & SLUGLETT, *supra* note 10, at 114 (maintaining that Iran initiated the use of chemical weapons).

39. SADDAM'S WAR, *supra* note 23, at 88-89; GULF WAR, *supra* note 33, at 263-64.

40. GULF WAR, *supra* note 33, at 89. Nevertheless, Arab states criticized western states

III. THE GULF WAR

A. *The Invasion of Kuwait*

Significantly, Saddam Hussein emerged from the Iraq-Iran war as a victor, at least in the eyes of his own people. This status encouraged his aggression. Attempting to gain in regional supremacy and the Arab leadership ranks, Saddam no doubt saw the invasion of Kuwait as a means of furthering his goals.[41] In seeking to build Arab support for the invasion, Hussein appealed to *gawmiya*, Arab loyalty which transcends the national boundaries imposed by western imperialists.[42] He no doubt also hoped to play on the dislike of the northern Arab world for their oil-rich neighbors on the Arabian peninsula.

Saddam also faced economic problems. Recognizing that Kuwait threatened Iraqi livelihood by driving down the world oil price, Saddam painted the Kuwaitis as aggressors. He announced that the Kuwaitis had lied and broken agreements with the Iraqis, a complaint perhaps originating in the Kuwaitis' refusals to forgive Iraq's loans as had the government of Saudi Arabia.[43]

Iraqi soldiers began the invasion of Kuwait on August 2, 1990, and by August 8, Saddam had annexed the country.

B. *The Fighting*

Clearly U.S. involvement in the Iran-Iraq War would have created the threat of opposing Soviet military intervention. Such an intervention might have resulted in a nuclear attack, since the U.S. did not have a large number of forces in the Gulf region at that time. By the summer of 1990, however, the situation had changed. The U.S.S.R. had retreated from the international scene in an effort to deal with the collapsing Soviet empire. The terms of the Iraqi invasion likewise differed from the invasion of Iran. Unlike Iran in the Iran-Iraq war, which was on fairly equal

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for what they termed intervention in the internal matters of the Iraqi government. At least three of these countries—Syria, Libya, and Egypt—had obtained or were in the process of obtaining the capacity to produce chemical weapons. As such weapons are cheap and easy to produce, these countries no doubt had their own futures in mind. Turkey, while opening its borders to the Kurds, refused to furnish international bodies with evidence that its own doctors found use of gas. Likewise, the Turkish government actively discouraged outsiders from gathering evidence. Many Iraqi civilians returned to Iraq. Of those that did, many were separated into male and female groups, and the males were never again heard from. At the end of the war, Republican Guard units went into the marshes north of Bassra, and called for the surrender of the many deserters known to be hidden there. Those that gave themselves up were imprisoned or shot, and gas was used in the marshes, killing those that remained. *Id.* at 264-66.

41. SADDAM'S WAR, *supra* note 23, at 74.

42. For a further discussion and an excerpt of a letter to this effect from Tariq Aziz, then foreign minister of Iraq, to the leader of the Arab League, see *Out of Joint; A New Arab Order*, ECONOMIST, Sept. 28, 1991, at 4.

43. SADDAM'S WAR, *supra* note 23, at 13, 21.

footing with Iraq in what could be characterized as a regional border dispute, Kuwait appeared to be an innocent victim of an aggressive takeover.[44]

Thomas R. Pickering, the chief U. S. representative to the United Nations called for the Security Council to condemn the invasion. On August 6, the Council voted to impose a worldwide trade embargo on Iraq, sanctions of unprecedented scope.[45] Resolution 678 authorized the American-led coalition to use force if necessary, setting a deadline for Iraq's withdrawal from Kuwait of January 15 at midnight, New York time.[46]

In early January, last minute negotiations in Geneva between Tariq Aziz and James Baker dissolved. Therefore, on January 17, 1991, shortly after the United Nations deadline passed, Operation Desert Storm began and President Bush proclaimed that "the liberation of Kuwait" had begun. By the time the war started, the U. S. had the support of a coalition of twenty-eight members, a coalition that grew to thirty-seven members by the end of the war. The American-led force, commanded by General H. Norman Schwartzkopf, began a massive air campaign which was to include one hundred thousand sorties, the primary destination of which were military command and control targets.[47]

Saddam responded by attacking Saudi Arabia and Israel with improved Scud missiles, failing to distinguish between military and civilian targets. He also used an environmental weapon. By opening pumping stations ten miles off of Kuwait, he unleashed ten million barrels of crude oil into the Gulf. He did so, perhaps, to complicate an amphibious landing off Kuwait, to cloud the atmosphere making bombing more difficult, or to disrupt water supplies in Saudi Arabia.

The hundred-hour ground war began six months and two weeks after the invasion of Kuwait and ended quickly with Iraq's surrender. Soon after the surrender, Iraq accepted the United Nations' twelve resolutions and arranged a cease-fire with General Schwartzkopf and Saudi Arabian Prince Khalid bin Sultan.[48]

C. *Post-war Civil Fighting*

With the end of the war came widespread civil fighting in Iraq. Opponents of Saddam's regime, predominantly the Shia Muslims in the south and the Kurdish population in the north, seized the chance to try to topple what was perceived as an already vulnerable government.[49]

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44. *Id.* at 3-6.

45. SCIOLINO, *supra* note 36, at 221-22.

46. S.C. Res. 678, U.N. SCOR, 46th Sess. (1990).

47. SCIOLINO, *supra* note 36, at 25-30.

48. *Id.* at 255-62.

49. Religiously, the Iraqi elites represent what is alternately estimated to be the dominant branch of Islam in their country, the Sunni Muslims. The Sunnis have a twelve hundred year history of conflict with the Shia Muslims, the other prominent Islamic sect in Iraq, whose members dominate the population of the territory stretching from Baghdad

The Kurdish uprising, like the Shiite rebellion, ended quickly. Although broadcasts on Voice of Free Iraq, a covert radio station alleged to be C.I.A.-supported, called for the destruction of Saddam's regime as late as March 29, Iraqi troops quashed the main of the Kurdish resistance in about five days.[50] In violation of the cease-fire agreement, the Iraqi government used helicopters to shoot down the resistance fighters. Many were killed and hundreds of thousands of Kurds fled the country.

Fighting has persisted intermittently on the border of Kurdistan. In October, Massoud Barzani, the son of Mulla Mustaf Barzani and current leader of the P.U.K., and Hussein Kamal al-Takriti, the then Iraqi defence minister, arranged a cease-fire, albeit too late to stop a new mass exodus of Kurds from the fighting area.[51]

D. *The Status of Kurdistan*

After the war, Kurdish guerrillas reclaimed large parts of Kurdistan. Refugees and Kurdish businessmen and their families alike seized the chance to return to their homelands and rebuild the towns destroyed by the Iraqi army under the government's policy of forced mass relocation which began in 1976 and peaked at the end of the Iran-Iraq War. On March 18, 1991, the *pesh merga* reclaimed the city of Halabja, the scene of one of Saddam's greatest crimes.[52] The Kurds continue to reclaim their cities in northern Iraq and, in doing so, have discovered new evidence of the cruelty of Saddam Hussein's dictatorship. Journalists report that the Kurds have uncovered "mass graves, torture chambers, elaborate prison systems and comments from secret police files that attest to the inner workings of one of the region's harshest dictatorships."[53] Some of the newly-discovered mass graves appear to be of recent origin.[54]

The Kurds returned to their homelands under the protection of allied forces. As of this writing, military observers continue to monitor the security zone in northern Iraq, whose southern boundary approximates the thirty-sixth parallel, that the American-led forces established after the war. Overflights by allied warplanes based in Turkey continue to patrol the skies.[55]

Due in part to the security zone, the Kurds maintain *de facto* control in many of the towns in northern Iraq, although the towns are supposed

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southeast along the Tigris and Euphrates to Basra. HENDERSON, *supra* note 4, at 26-27.

50. *See* Michael Wines, *Kurd Gives Account of Broadcasts to Iraq Linked to the C.I.A.*, N.Y. TIMES, Apr. 6, 1991, at A1.

51. *The Kurds; The Horror at Sulaymaniyah*, ECONOMIST, Oct. 12, 1991, at 43.

52. Kelly, *supra* note 30, at 25; Patrick E. Tyler, *In Town Iraqis Gassed, Kurds Now Breathe Free*, N.Y. TIMES, Nov. 18, 1991, at A4.

53. Chris Hedges, *Kurds Unearthing New Evidence of Iraqi Killing*, N.Y. TIMES, Dec. 7, 1991, at A1.

54. *Id.* at A7.

55. Chris Hedges, *As Kurds Enjoy Freedom, They Wake Neighbors*, N.Y. TIMES, Aug. 16, 1992, Sec. 4, at 6.

to be run by the Kurds and the Iraqi army jointly.[56] In July, the Kurds swore in a new, popularly elected government, intended to fill the administrative vacuum created by Baghdad's withdrawal from the area after the arrival of the American-led forces.[57] Although Saddam denounced the elections as illegal, the presence of Western forces has thus far prevented military retaliation.[58] Additionally, the two main Kurdish political parties, the K.D.P. and the P.U.K., have agreed to combine their guerrilla units into a single force under Kurdish Government command. Negotiations with smaller Kurdish parties that have their own guerilla forces are expected to add to the new force.[59]

Despite the allied presence, Saddam's forces continue to wage harassing attacks on the Kurds as well as U.N. relief workers.[60] The government has imposed an embargo on the north which the Secretary General of P.U.K, Jalal Talabani, described as a policy of starvation of the Kurds in Kurdistan meant to force their surrender.[61]

Defying Saddam's refusal to renew its aid agreement with the United Nations, the Security Council has ordered United Nations aid agencies to continue efforts to supply food and medicine to Iraqi citizens. Iraq has succeeded in hampering international relief efforts, by refusing to renew expiring visas or to issue the travel permits that allow relief workers to travel around the country.[62]

Saddam ostensibly welcomes the Kurdish refugees back to Iraq, after their mass exodus during the civil strife which followed the Gulf War.[63] Thousands of Kurds, have not yet returned to their homes. Saddam has attempted, as of yet unsuccessfully, to negotiate a deal with the Kurds to guarantee them a degree of autonomy and national rights.[64] Although

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56. *See* Tyler, *supra* note 52, at A4.

57. Hedges, *supra* note 55.

58. *Kurds Convene Parliament*, N.Y. TIMES, June 5, 1992, at A9.

59. *Two Kurdish Parties Agree to Merger*, N.Y. TIMES, Sept. 15, 1992, at A15. Reports indicate that Kurdish leaders have also met to negotiate with other Iraqi opposition groups, from Shiite Muslims to Arab nationalists, in attempts to consolidate their efforts against Saddam. *Iraq Opposition Says Parley In North Unifies Its Ranks*, N.Y. TIMES, Sept. 27, 1992, at A5.

60. Hedges, *supra* note 55; *The House the UN Built*, ECONOMIST, July 11, 1992, at 38; Paul Lewis, *U.N. Agencies Ordered to Continue Efforts in Iraq*, N.Y. TIMES, Sept. 3, 1992, at A10.

61. *Kurdish Leader Talabani Warns of New "War of Extermination"* (British Broadcasting Corporation broadcast, November 12, 1991) [hereinafter *"War of Extermination"*].

62. Lewis, *supra* note 60.

63. Such promises have held little meaning in the past, however. For instance, in June 1990, when Kurdish refugees were promised amnesty in returning from Turkey, Amnesty International reported that the Iraqi government had executed at least seven Kurdish refugees and that several hundreds of returning Kurds had disappeared. *Amnesty Claims Iraq Killed Returning Kurds*, WASH. TIMES, June 21, 1990, at A2.

64. Kurdish leaders say they had little choice but to begin these talks, as they lack consistent international support. Tim Post et. al., *A Nation in the Valley of the Three Frontiers*, NEWSWEEK, May 6, 1991, at 42.

Saddam promised democracy,[65] Kurdish leaders maintain that he persists in silencing anyone calling for democratic measures.[66]

For the present, the Kurdish refugees are forced to rely on the protection of a United Nations security force and the allied presence in Turkey. The Iraqi Kurds, however, are understandably skeptical that the United Nations forces will provide them with adequate security and are painfully aware that troops will not monitor the situation forever. Furthermore, allied attention has recently turned to the Shiites in the South, and indeed to crises elsewhere in the world, deflecting attention from the plight of the Kurds.

IV. EXAMINATION OF INTERNATIONAL INTERVENTION ON BEHALF OF THE KURDS

A. *Historical Analysis*

Historically, the Kurdish movement has been unable to use international force for its protection. Unlike other minority groups, such as the Blacks in South Africa or the Palestinians, the Kurds have not historically benefitted from United Nations resolutions for their protection. Lacking a representative at the United Nations, the Kurds have been unable to find a state willing to promote their case and thereby prejudice its relation with Iraq.[67] Events following the Gulf War suggested that the situation was about to change.

B. *Intervention After the Gulf War*

1. World Reaction

Engaging Saddam Hussein's forces militarily forced the international community to acknowledge the extent of the violence committed by the Iraqi leader's regime. After the war, the international community finally

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65. Saddam stated, "Our decision to build a democratic society based on the constitution, the rule of law and political pluralism is irrevocable." In the same speech, however, he ominously warned that the Kurds were "repeating the same fateful error . . . and facing the same fate as those who came before." *In the Backwash of the Gulf*, ECONOMIST, Mar. 23, 1991, at 43.

66. *War of Extermination*, *supra* note 61.

67. After being told in 1961 that they could not bring their own case to the United Nations, the Iraqi Kurds persuaded the Mongolian Soviet Socialist Republic to do so in 1963, perhaps in response to the overthrow of Qasim and the persecution of his communist supporters. The Soviet delegation sent a letter to the President of the Security Council which accused the Iraqi army of violence against the Kurds and threatened to introduce the topic for discussion. ADNAN PACHACHI, IRAQ'S VOICE AT THE UNITED NATIONS 1959-69: A PERSONAL RECORD 378 (1991). The Republic withdrew, however, before doing so, perhaps fearful of hostile Arab pressure. The USSR brought the Kurdish case up in the Economic and Social Council of the United Nations the same year. In the sixties and seventies the Kurds sought sponsors in both the Arab and non-Arab worlds but were unsuccessful in their consultations, including those with Cyprus, Ireland, and Iceland. MCDOWELL, *supra* note 6, at 27.

recognized not only the suffering that Saddam inflicted on the Kurds following the end of the war but also the fact that the regime had a long history of oppressing the Kurdish people.

The Allies, however, stopped the war short of ending Saddam's regime. In fact, the quick cease-fire following the hundred-hour ground war left the Iraqi government with sufficient force to oppress resisters. A realization of the significance of the Gulf War in creating the Kurdish tragedy intensified public pressure to respond to the Kurds' plight. No doubt revelations of the role played by some western democracies in instigating the Kurdish rebellion also contributed to a feeling of moral responsibility. After the war, it became clear that the C.I.A. supported a radio campaign over Voice of Free Iraq calling for a Kurdish rebellion, although President Bush surely never thought such a rebellion would succeed. Furthermore, British special forces reportedly worked with the Kurds to instigate an uprising.[68]

Although the official British position was that no country or coalition of countries should send troops to Iraq for any reason other than to protect relief missions, politicians, including Members of Parliament, were not insensitive to the implications of having provided British support for a Kurdish uprising and the growing public pressure to protect the Kurds. One M.P., Nicholas Budgen, added his query to more than an hour of hostile questioning of Douglas Hurd, the British Foreign Secretary: "Wouldn't it be truly dreadful if they [the Kurds] were encouraged to fight on by vague talk about the use of forces on their behalf, when President Bush has already said the forces of the U.S.A. will not be engaged in a civil war in Iraq?"[69]

The media likewise contributed to the call for intervention by bombarding viewers with images of a starving people, ravished by war and seeking safety across the Iraqi border. The images reinforced a near universal recognition of the gross human rights violations which Saddam had committed and the resulting precariousness of the Kurds' plight.

The world's leaders ultimately responded to public pressure, albeit slowly, and through a series of complex signalling suggested an intent to

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68. *See* Wines, *supra* note 50; Tom Mathews et. al., *A Quagmire After All: How the Bush Administration Trapped Itself While Trying to Wage Peace*, NEWSWEEK, Apr. 29, 1991, at 24. Talabani reported in an interview:

> After the appeal of the Americans, spontaneous and unorganized demonstrations erupted everywhere. The Peshmerga fighters were outside the town, and only later did we decide to support the demonstrators. It is also forgotten that the 150,000 allegedly loyal Kurdish militia and large parts of the Iraqi Army defected to us. Therefore, one cannot claim that the political forces initiated the uprising.

Kurdistan Front Leader Criticizes U.S., Allies (Wochenpresse broadcast from Vienna, in German, Apr. 14, 1991).

69. Judy Jones, *Parliament and Politics: MPs Demand More Action by West in Support of Kurds; Kurdish Refugee Crisis: Commons Statement*, INDEPENDENT, Apr. 16, 1991, at 9.

intervene on behalf of the Kurds. It appeared for several weeks as if the traditional notion of humanitarian intervention might be expanded to ensure the Kurds' security. Comments by international leaders reflected this possibility. Douglas Hurd, Britain's Foreign Secretary, announced that the division between a country's external and internal affairs is not absolute.[70] Roland Dumas, the Foreign Minister of France, stated that he believed, "the Kurdish crisis could act as a detonator" for re-thinking of the concept of non-intervention, a concept which the French have long argued to redefine. Similarly, Austria pledged that it would call on the international community (in the United Nations General Assembly) to state unequivocally that defence of human rights does not constitute interference in a country's internal affairs.[71]

2. The European Community's Response

On April 8, the European Community (E.C.) held an emergency summit meeting in Luxembourg to respond to the crisis. In addition to voting for one hundred eighty billion dollars in aid, the European leaders supported a plan to create a Kurdish safe haven. It was the British Prime Minister, John Major, who proposed the creation of enclaves, something close to an international protectorate for the Kurds. The area involved was to cover northern Iraq, presumably including most mountain towns, the city of Irbil, and the city of Kirkuk, an oil-producing city over which the Kurds have long argued for control.[72] The British originally appeared to be prepared to use force if necessary, in order to establish and maintain the enclaves.[73] Major emphasized the need not only for relief but also for "a degree of protection which the average United Nations relief worker cannot do."[74] There was even some mention of sending over British bobbies.[75] The enclave idea was accepted within three hours, and Francois Mitterrand, the French president, offered to co-sponsor it at the United Nations.[76]

The plan that the E.C. endorsed was novel, indeed so novel that it appeared to be almost deliberately unworkable. The plan contemplated the division of Iraq and the removal of a block of territory from Iraq's sovereign control. Its enforcement would likely have led to a long-term

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70. Sarah Helm, *Sovereignty Law May Be Stretched But Not Broken*, INDEPENDENT, Apr. 12, 1991, at 10.

71. *G-7 Backs Greater U.N. Role in Internal Conflicts*, REUTERS (BC cycle), July 16, 1991.

72. *See, e.g.*, *That Slippery Slope*, ECONOMIST, Apr. 13th, 1991, at 39; William Tuohy & Rone Tempest, *Europeans Seek Haven for Kurds; Refugees: Britain's Plan to Create a Shelter Zone in Northern Iraq Wins EC Endorsement*, L. A. TIMES, Apr. 9, 1991, at A6.

73. William Drazdiak, *Europeans to Press Bush to Back Enclave Plan; EC Responds to Outrage Over Kurds' Plight*, WASH. POST, Apr. 11, 1991, at A34.

74. *Hurd on UN Police Plan* (Press Association Broadcast (London) Apr. 28, 1991).

75. *Id.*

76. R.C. Longworth, *Wrong Turn: Europe's Effort to Aid Kurds Had Too Many Holes*, CHI. TRIB., Apr. 14, 1991, at D1.

allied commitment in the region if not, ultimately, to an independent Kurdish nation. Once the Kurds tasted such independence, they would no doubt find permanent independence a more attractive alternative than a renegotiated autonomy agreement with an untrustworthy regime.

The land considered for inclusion in the enclave plan included at least one city, Kirkuk, over which the Kurds and the Iraqi government had long struggled for control. The creation of enclaves would have created complex problems not only concerning the delimitation of borders but also involving the international legal status of the zones and the relationship of the zones to the Kurds in the neighboring countries of Turkey and Iran. The E.C. surely did not believe that Saddam would have ceded his sovereignty over this broad expanse of Iraq without any military resistance. Simultaneously, the leaders knew of Bush's desire to withdraw all American troops from the area.

One commentator suggested that the plan "grew from a compost of Western guilt, European ambition, British politics and Luxembourg's machismo, plus the concern of two powerful women in London and Paris [Margaret Thatcher, who called on John Major to aid the Kurds quickly and 'without standing on legal niceties,' and Danielle Mitterand, wife of the French president and long-time champion of the Kurds]."[77] Indeed, the British Prime Minister faced pressure to act on the Kurd's behalf not only from his predecessor, Margaret Thatcher, but also from the entire E.C. He undoubtedly felt the need to cooperate with and even lead the E.C, having spent several months attempting to mend rifts created under Thatcher, when Britain was repeatedly the lone dissenter to E.C. initiatives. Also, the E.C. likely felt the need to restore its push for unity after the Gulf War, and indeed, to show its outrage at Saddam's behavior.[78]

The U.S. entertained the idea of safe havens outside the authority of the Iraqi government but reconsidered when Iraq expressed its outrage at the plan, thereby suggesting that an attempt to implement the plan might have entailed further military intervention. Iraqi Prime Minister Saddoun Hammadi claimed that the idea had been "engineered and conducted by the C.I.A." and vowed Iraqi resistance to it by all possible means.[79] Similarly, Iraqi Ambassador Abdul Amir Anbari called the enclave proposal a "wild idea," proclaiming that "[t]he whole of Iraq is a safe haven to everyone."[80]

On April 15, the twelve members of the E.C. met again in Luxembourg and, at Germany's initiative, agreed to ask the United Nations if Saddam could face a war crimes tribunal. They maintained that the Iraqi leader should be charged for attacking other states, using chemical weap-

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77. *Id.*

78. *Id.*

79. Ann Devroy & John M. Goshko, *U.S. Shifts on Refugee Enclaves; Safe Zones Inside Iraq Seen as Unrealistic; Aid Increase Stressed*, WASH. POST, Apr. 10, 1991, at A1.

80. William Drozdiak & David B. Ottaway, *U.S., Allies Want Refugee Havens Established in Iraq; Europeans Back Protective Zone for Kurds*, WASH. POST, Apr. 9, 1991, at A1.

ons against his own civilians, and carrying out genocide against the Kurds. The members also endorsed a French plan calling for the creation of humanitarian aid centers in the northern part of Iraq and United Nations-protected "corridors" to allow the safe return of the refugees.[81]

In response to the call for a war crimes tribunal, the U.S. argued that the Arab states would support Saddam against allegations for war crimes, thereby preserving his power and causing Western pressure to be ineffective. Furthermore, U.S. officials felt that such a tribunal would preempt Saddam from seeking exile abroad.[82]

3. United States Action

The U.S. was slower than the E.C. to offer a proposed plan of response to the Kurdish emergency. President Bush had repeatedly pledged during the build-up of troops in Iraq that the deployment would be only temporary. The decision to end the ground war quickly was made without considering the implications for the Kurds or the possibility of a civil war but rather out of concern for public opinion. Bush told the press: "All along I have said that the United States is not going to intervene militarily in Iraq's internal affairs and risk being drawn into a Vietnam-style quagmire. . . . Nor will we become an occupying power with U.S. troops patrolling the streets of Baghdad."[83]

International pressure, however, particularly from Turkey's President Turgut Ozal, forced the U.S. to compromise and begin an open-ended relief plan. On April 6, the U.S. began relief efforts contained to the Iraqi-Turkish border in a mission labeled "Operation Provide Comfort." As the name implies, the U.S. operation was deemed humanitarian and not political. The President warned the Iraqis against using gas and flying aircraft in the area of Northern Iraq, thereby creating a *de facto* zone of safety around the Kurds.[84] The United Nations Security Council promptly voted to dispatch its own peacekeeping observers and soldiers to the Iraqi-Kuwait border to help expedite the withdrawal of allied troops.[85] The original relief efforts, proved insufficient. On April 16, Bush

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81. Adam Kelliher & Robin Oakley, *Iraq Allows UN Access to Aid Starving Kurds*, TIMES, Apr. 16, 1991, at 1.

82. Laurie Mylone, *The Way to Fell Saddam: Trial and Error*, NEW REPUBLIC, June 3, 1991, at 17.

83. John E. Yang & Barton Gellman, *U.S. Forces to Set Up Refugee Camps in Iraq; Expanded Kurdish Relief Effort Represents Fundamental Shift*, WASH. POST, Apr. 17, 1991, at A1.

84. The United States did in fact destroy one Iraqi fighter violating this ban; however, it seems not to have been strictly enforced. Mathews et. al., *supra* note 68, at 24. Kurdish leader, Jalal Talabani, testified that in violation of the cease-fire agreement, Saddam used planes, helicopters, heavy artillery, gasoline, and napalmphosphorous bombs. *Kurdistan Front Leader Criticizes U.S., Allies* (Wochenpresse broadcast from Vienna, in German, Apr. 11, 1991).

85. Stanley Meisler, *U.N. Approves Dispatching of Peacekeepers*, L.A. TIMES, Apr. 10, 1991, at A4.

committed U.S. forces to establishing five or six relief camps inside Iraq as an "interim measure," despite a deep reluctance to do so.[86] The United Nations eventually took over this relief effort, and the U.S. was quickly satisfied that its role was no longer necessary. As early as June 25, a Department of Defense spokesman announced that the U.S. mission was complete, referring to the mission of bringing Kurdish refugees safely down from the mountains and emphasizing that the goal of the U.S. was never ensuring the long-term well-being of the Kurds.[87]

Although they declined Kurdish requests to maintain a stronger military presence in northern Iraq, the U.S. and its allies agreed to leave a "brigade-sized" rapid-response military force in Turkey. The force was left to be used in the event it was deemed necessary to intervene on behalf of the Kurds.[88]

4. The Role of the United Nations

Although Iraq had been negotiating with the United Nations for aid, talks broke down abruptly when relief from U.S., British, and French sources appeared imminent. The advantage of the United Nations plan as originally discussed between Prince Sadruddin Aga Khan, the United Nations special envoy, and Ahmed Hussein, the Iraqi Foreign Minister, was its scope. The plan contemplated the establishment of special centers, manned by United Nations officials, throughout Iraq. The Iraqis preferred Bush's proposed plan, which limited protection to special enclaves for the Kurds in the northern part of Iraq, despite heavy fighting, severe casualties, and great destruction in the country's southern cities.[89] The Iraqis, of course, condemned even Bush's plan as " 'foreign meddling.' "[90]

Instead of condemning interference by other states, the United Nations signalled to member states that interference was appropriate and indeed appealed to the international community to contribute to humanitarian relief efforts. By passing Resolution 688, on April 5, the United Nations Security Council approved for the first time "the right to interfere" on humanitarian grounds in the internal affairs of a member state. As one jurist, from the Université de Paris-Sud, noted following the vote: "Although cross-border humanitarian aid long has been tolerated if not legally binding activity by nongovernmental organizations for moving food, medicines and other help to the needy, the Security Council vote marked the first time governments openly gave their seal of approval to

86. Yang & Gellman, *supra* note 83.

87. R. Jeffrey Smith & Barton Gellman, *U.S., Allies Agree to Form Force for Protection of Kurds; 5,000 Troops Would Be Stationed in Turkey*, WASH. POST, June 26, 1991, at A9.

88. *Id.*

89. Patrick Cockburn, *Iraq Backs Off Signing Accord for UN Centres*, INDEPENDENT, Apr. 18, 1991, at 14.

90. Russel Watson et al., *A Lifeline in Iraq*, NEWSWEEK, Apr. 29, 1991, at 18, 21.

such practices."[91] Indeed, it looked as if the United Nations was going to allow a redefinition of humanitarian intervention.

Resolution 688 was worded in terms of a response to the threat to international peace and security posed as a consequence of Saddam's oppression of the Kurds. By focusing on the consequences of Saddam's actions rather than on his human rights violations per se, the Security Council stayed clearly within its jurisdiction under Chapter VII of the United Nations Charter. The Resolution demanded that Iraq, "as a contribution to removing the threat to international peace and security in the region, immediately end this repression" and "[i]nsist[ed] that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and . . . make available all necessary facilitates for their operations."[92]

As for Iraq's treatment of the Kurds, in particular, the Resolution condemned the repression and "express[ed] the *hope* . . . that an open dialogue w[ould] take place to ensure that the human and political rights of all Iraqi citizens are represented."[93] The Resolution, made repeated reference to principles of sovereignty, including a specific reference to Article 2, paragraph 7 of the United Nations Charter.

As the debate concerning Resolution 688 underlined, the massive flow of refugees into Turkey and Iran, and even Saudi Arabia, indeed threatened interstate relations and regional security.[94] The border countries lacked the resources to handle such a massive influx of destitute people. The number of refugees vastly surpassed those of the 1988 exodus which followed the end of the Iran-Iraq War.[95]

Iran and Turkey feared that the refugee population would instigate Kurdish uprisings in their own countries. Noting Turkey's respect for the territorial integrity of other states, the Turkish representative to the United Nations argued that the scale of human tragedy and its international implications made the events in Northern Iraq beyond the scope of an "internal affair."[96] He pleaded with the Security Council: "[W]e are

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91. The writer traced the progress of United Nations support for humanitarian intervention back to the General Assembly's adoption by consensus of Resolution 43-131 on December 8, 1988, "which formally recognized the role of nongovernmental organizations in 'natural disasters and similar emergency situations.' " This concededly soft law, a political and moral statement, was followed two years later by General Assembly Resolution 45-100, which provided for catastrophe evaluation teams and specific access corridors for workers providing humanitarian relief. Mario Bettati, *The Right to Interfere*, WASH. POST, Apr. 14, 1991, at B7.

92. S.C. Res. 688, U.N. SCOR 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991).

93. *Id.* (emphasis added).

94. For a description of the Saudi refugee problem, see Drozdiak & Ottaway, *supra* note 80.

95. U.N. SCOR, 46th Sess., 2982nd mtg. at 6-7, 13-15, U.N. Doc. S/PV.2982 (1991) (comments of the Representatives of Turkey and Iran respectively) [hereinafter Security Council Record].

96. *Id.* at 6.

duty bound to take whatever measures we deem necessary to prevent the anarchy and chaos reigning on the Iraqi side of the border from spilling over into our country."[97] The representative requested that the Security Council demand that the Iraqi government demonstrate respect for international borders as well as human rights.

Furthermore, Iraq's military attacks on the fleeing Kurds extended beyond the Iraqi borders. Iran's representative to the United Nations testified concerning the Iraqi shelling of Iranian border towns, in which at least three Iranian border guards were killed.[98] Likewise, the Turkish representative reported that Iraqi mortar shells were landing on Turkish territory.[99]

The three states that voted against Resolution 688—Cuba, Yemen, and Zimbabwe—argued, predictably, that the issue was an internal political matter over which the Security Council had no jurisdiction.[100] China and India abstained from the vote.

Iraq denounced any intervention. In a letter to the Security Council, Iraq's representative to the United Nations deplored what he called "abominable criminal acts" committed by "groups of saboteurs" and stated that certain Iraqi citizens, presumably the Kurds, "ha[d] been victims of the campaign of terror and lies disseminated by the saboteurs or have been compelled by armed force to leave the country . . . serving as a shield for the above-mentioned groups or a means of facilitating their escape abroad."[101]

C. *Evaluation*

Ultimately, the limited reading which member states gave to Resolution 688 did not stretch the meaning of humanitarian intervention. The U.S. maintained that another United Nations resolution would be necessary in order to ensure longer-term protection for the Kurds, a resolution which Bush suggested was unlikely.[102] Resolution 688 was certainly not read to permit military intervention on behalf of the Kurds, an arguably supportable reading that would have made it truly precedent-setting.

Then Secretary General of the United Nations, Javier Perez de Cuel-

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97. *Id* at 7.

98. Letter Dated 3 April 1991 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary General, U.N. SCOR, 46th Sess., U.N. Doc. S/22436 (1991).

99. Letter Dated 2 April 1991 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. SCOR 46th Sess., U.N. Doc. S/22435 (1991).

100. *See* Security Council Record, *supra* note 95, at 27-30,31-32, 42-53 (reporting comments of the Representatives of Yemen, Zimbabwe, and Cuba respectively).

101. Letter Dated 3 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary General, U.N. SCOR, 46th Sess., U.N. Doc. S/22440 (1991).

102. Yang & Gellman, *supra* note 83, at A1.

lar, spoke prematurely when he said, following the adoption of Resolution 688: "We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents."[103] The defense of the Kurds was not accomplished. Ultimately, sovereignty triumphed over civil rights. Several factors no doubt mediated against stronger action.

First, as discussed above, the U.S. in particular wished to avoid an extension of the war. In democratic countries, prolonged and bloody wars cause politicians to lose votes, and Bush did not want to threaten the widespread national support for the military operation that he had just completed. Therefore, Bush reacted hesitatingly to British and French calls for the continued use of force in the region.

Second, there are many reasons why the U.S. wished to avoid an interference on behalf of the Kurds that would have led to the creation of Kurdish enclaves or even an independent Kurdish state.

The U.S. has commitments to a number of Arab states. Among the Arab nations, there is a strong feeling of a Arab unity that transcends state boundaries.[104] There is a common concern for Arab security which extends to protecting Arab land against alienation. The U.S.' Arab allies would no doubt have viewed the creation of, or the facilitation of the creation of, a permanent Kurdish enclave or state as the usurpation of Arab land.

President Bush did not wish to provide a base for Kurdish guerilla activity, in Iraq or abroad. The U.S. feared the creation of a permanent Gaza-strip like area. The creation of such a zone would no doubt have led to the need for an extended military presence in the Gulf for its protection.

Nor did the international community wish to create an independent Kurdish state and thereby drastically alter the balance of power in the region. As it has been traditionally, the international community was wary of supporting a movement for Kurdish autonomy because of the Kurdish populations in other middle eastern states. A Kurdish enclave in Iraq could lead to new demands for a Kurdish homeland, threatening the stability of Turkey, Syria, and Iran.

Kurdish support has always been risky, because it is likely to lead to criticisms of other states with Kurdish populations. The Kurdish population in Turkey, for example, has historically enjoyed fewer rights than the Iraqi Kurds. The inherent tension of this situation was perhaps most recently exemplified by the fact that President Bush did not meet with Jalal Talabani, secretary general of the P.U.K. and president of the Kur-

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103. Stephen S. Rosenfeld, *As Borders Come Down*, WASH. POST, Oct. 11, 1991, at A27 (quoting De Cuellar).

104. *See A New Arab Order, in* ECONOMIST, Sept. 28 1991, at 4 (discussing the new dimensions of Arab unity and the threats to traditional Arab alliances).

distan Front, on his recent visit to the U.S., probably for fear of angering Turkish president, Turgut Ozal.

Part of Ozal's reluctance to allow Iraqi Kurds into his country has been his fear of feeding the Kurdish separatist movement in Turkey. Although Ozal met with Iraqi Kurds, including Talabani, and plead for international aid on their behalf, he would not support an independent Kurdish state or a divided Iraq.[105] In fact, the Iraqi Kurds' relations with Turkey have become strained since Ozal's initial call for relief on their behalf, because so many Turks feel that a power vacuum in Northern Iraq threatens Turkey's ability to control its own radical Kurdish separatist movement in southeast Turkey.[106] The allies no doubt were fearful of the implications of a Kurdish secession in such a volatile region.

Finally, and perhaps most importantly, there was a general fear among the member states of the United Nations, of creating a precedent for indiscriminate intervention based on human rights violations. No doubt it was this fear that prompted the drafters of Security Council Resolution 688 not only to reiterate the Council's respect for territorial sovereignty throughout the resolution but also to focus on the threat to the international community posed by the flow of refugees to other countries rather than the Kurdish repression itself.

Setting a powerful precedent was particularly a fear of countries with their own secessionist minorities, such as China and the U.S.S.R., as they could be the next countries to become the object of an attack on human rights measures. Yevgeniy Primakov, then a member of the U.S.S.R. Security Council, said that he would be "shocked" if American, British, and French forces remained in Iraq on a long-term basis to protect the Kurds, expressing the general Soviet take on the situation.[107] Even many Western countries would have feared such a precedent. For instance, Great Britain would not want interference in its control of Northern Ireland.

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105. *Trying to Please*, ECONOMIST, Mar. 30th, 1991, at 38.

106. The Turkish government claimed, in fact, that guerrillas from the Kurdish Workers' Party (PKK), which has fought for seven years for independence from Turkey, were hiding in "safe havens" in Northern Iraq. Although Ozal has tried to use the Kurdistan Front, the coalition of Kurdish parties in northern Iraq, to keep the PKK under control, the Turkish army responded to PKK raids, in the past, with retaliation on Kurdish enclaves across the border. *Turkish-Iraqi Border: Eye for an Eye*, THE ECONOMIST, Nov. 2, 1991, at 42; *Wages of Defeat*, THE ECONOMIST, Aug. 17, 1991, at 36. In return for Turkey's support for the allied security zone, however, Iraqi Kurds have shut down northern border camps belonging to Kurdish rebels in Turkey. In retaliation, the Turkish Kurds have imposed a retaliatory ban, supported by attacks, on trucks headed into northern Iraq. Hedges, *supra* note 55.

107. *Primakov in Paris on the Middle East and Internal Affairs* (BBC broadcast, Apr. 30, 1991). In a routine briefing, Mr. Ignatenko, the U.S.S.R. president's aide and leader of the USSR President's Press Club, stated: "For us to be drawn into someone's interethnic or civil war is inconceivable. In addition it is well known that the problem of the Kurds is complex. It also applies directly to our own country, where there are about 160,000 Kurds living." *Ignatenko Cited on Georgia, Kurdish Refugees* (Izvestiya broadcast, Apr. 11, 1991).

V. APPRAISAL

Several political factors could have facilitated a larger response on behalf of the Kurds. A growing concern about human rights could have made a larger international response more palatable. The international human rights movement of the past decade and a half would seem to have prepared the international community for some sort of political interference to hold states to their human rights commitments. Moreover, the end of the Cold War has provided a climate in which interference is less likely to be viewed as motivated by the naked self-interest of the intervenor.[108]

At the time of the Kurdish crisis, the U.S.S.R. faced a crumbling empire and severe economic problems. From that position, it was unlikely to seriously object to a unanimous intervention by the western democracies, particularly while it was appealing to those same nations for economic aid. Dissent to Security Council Resolution 688 was minimal. Even China, a country among those most likely to fear a more intrusive standard for humanitarian intervention, merely abstained from voting on the Resolution, rather than offering emphatic protest. Thus the political climate at the time of the Kurdish intervention appeared ripe for an expansion of the doctrine.

More importantly, the Kurdish issue was extremely clear cut. There was near universal consensus that Saddam was waging, and had in the past waged, a racially based campaign of terror against the Kurds. As Germany's representative to the United Nations declared during the debate of Security Council Resolution 688: "The brutal use of weapons and other agents of destruction against the Kurdish minority and other parts of the Iraqi population, and the mass exodus it has precipitated, harbor the danger of genocide."[109] As the representative from France maintained, human rights violations of the proportion of those waged against the Kurds "assume the dimension of a crime against humanity."[110] Under such circumstances, an intervention is not only allowed but would appear to be required.

By failing to intervene in a more meaningful way, the allies ultimately failed to uphold the most minimal human rights standards. When the fighting ended, the U.S. prematurely ended its watch over Saddam Hussein and allowed the massacre and forced exodus of over a million civilians. Entire towns were emptied as the residents fled, under intense mortar fire, to the cold, remote mountains on the Iraqi border. The Kurdish plea for help was unmistakable. Saddam's human rights violations called for a response that transcended borders and political interests.

Human dignity demanded an intervention to protect the Kurds from

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108. Rosenfeld, *supra* note 103.
109. Security Council Record, *supra* note 95, at 71.
110. *Id.* at 53.

Saddam's massive killing. In order to maintain a civilized community, the international community must not tolerate such blatant extermination of civilians. The responsibility is only intensified where international interference has contributed to the unrest. The U.S. owes more to the Kurds than simple encouragement to rise up against Saddam.

Sarah E. Whitesell

BOOK REVIEW

International Legal Problems in the Peaceful Use and Exploration of Outer Space

REVIEWED BY W. PAUL GORMLEY*

ANDEM, M., INTERNATIONAL LEGAL PROBLEMS IN THE PEACEFUL USE AND EXPLORATION OF OUTER SPACE, University of Lapland, Publications in Law, Series B20, Rovaniemi, Finland (1992); 511 pp.

Advances in space science and technology have led to the evolution of a new rubric of international law that impacts upon public, private, and comparative law. In order to deal with the growing demands imposed by humankind on this embryo branch of jurisprudence, Professor Maurice Andem has selected the vital topics of international and regional cooperation in the use and exploration of outer space for peaceful purposes.[1]

Within the time frame in which the study was composed, the ever present threat of conflict in space continued to dominate legal and political efforts to assure global security. From this vantage point, the author examines the uses of space in various fields, including space communications, meteorology, and remote sensing.[2] Andem also raises subsidiary issues, such as the significance of resolutions by the United Nations General Assembly. Indeed, the significance of resolutions from the Assembly

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1. MAURICE N. ANDEM, INTERNATIONAL LEGAL PROBLEMS IN THE PEACEFUL EXPLORATION OF OUTER SPACE 7-8 (1992) (hereinafter cited as OUTER SPACE.)

2. *Id.* at 8. As Judge Manfred Lachs observes in the Preface, "This study is one of the most detailed analysis of progress made in developing rules of conduct for States and individuals to, in and from outer space. Reading it one becomes aware how instruments circling round the globe had first been a romantic experience and have finally become an important chapter of man's activities." *Id.* at v.

is one of the recurrent themes of the book. In this regard, Dr. Andem has unyielding faith in the potential of the United Nations and its efforts to promote world peace, the new international economic order, human rights, environmental protection (by means of space satellites and space stations), along with this newer rubric - the law of outer space.[3]

The legal nature of this contemporary branch of law, and its evolution is examined in Chapter Two. Beginning with a series of resolutions from the United Nations General Assembly,[4] eventually leading to the 1967 Space Treaty,[5] the world community embarked on a period of cooperation (even though the two superpowers dealt with each other at "arms length") that had the potential of strengthening experiments directed toward world peace. For instance, the Committee on the Peaceful Uses of Outer Space (COPUOS) and its sub-committees adopted the effective consensus procedure for voting.[6]

The author acknowledges states are the primary subjects of space law,[7] but argues that international organizations should be recognized as subsidiary subjects, because of the missions they must fulfill. In the field of space law, the sovereign state remains supreme, and the changes perfected in public international law[8] have yet to be transferred or incorporated into the law of outer space. Though rejecting the view of individuals and groups as subjects of international law, the author softens his view in the concluding chapter when he speaks of mankind and humanity.[9] Indeed, Dr. Andem notes the role to be assumed by individuals, private enterprises and the human race when they utilize space for peaceful purposes.

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3. Maurice N. Andem, *International Law as an Evolutionary and Dynamic Legal System - With Special Reference to the New International Economic Order*, 2 FINNISH Y. B. INT'L L. 395 (1992); and Maurice N. Andem, *The 1985 NIGA Convention and the Promotion and Protection of Foreign Investment*, 3-4/1987 KANSAINOIKEUS IUS GENTIUM 237 (1987).

4. From 1958 through 1966 the United Nations General Assembly adopted a series of resolutions that are still binding on U.N. members. *See* G.A. Res. 1721 (XVI), G.A. Res. 1802 (XVII), and G.A. Res. 1962 (XVIII), discussed at pp. 16-20.

5. Treaty on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

6. OUTER SPACE, *supra* note 1, at 27-29.

7. I. H. Ph. Diederiks-Verschoor and W. Paul Gormley, *The Future Legal Status of Nongovernmental Entities In Outer Space: Private Individuals and Companies as Subjects of International Law*, 5 J. SPACE L. 125 (1977). MYRES S. MCDOUGAL, HAROLD D. LASSWELL, AND IVAN A. VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963).

8. W. PAUL GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 7-126, 127-184 (1966).

9. The imperative of his position must not be minimized, for as he concludes, "It is necessary to emphasize that their present and future participation in outer space activities either individually or jointly with states and international organizations, will not in any way grant them the status of subjects of international law of outer space. They, as a matter of fact, shall continue to be subjects of the applicable domestic law of states," OUTER SPACE, *supra* note 1, at 39.

In support of this position, Chapter Three examines the future impact of emerging international law, state practice, the legal force exerted by resolutions from international institutions, and judicial decisions. Special attention is devoted to the potential role of the International Court of Justice[10] to resolve outer space and environmental disputes.

The substantive portion of the book begins with Chapter Four, where Dr. Andem discusses significant areas of agreement between sovereign states on the differences between air and outer space. While outer space is governed by the 1967 Space Treaty,[11] air space above a state's territory is regulated by the Chicago Convention on Civil Aviation of 1944.[12] Here then, is an area in which states have cooperated for the purpose of facilitating communication and transportation. However, a major impasse remains unresolved, i.e. the delimitation between air and outer space. Despite cooperation between the members of COPUOS, the boundary remains unsettled. The author proposes 80 kilometers as the upper limit of air space in his final chapter. This limit needs to be set, since some supersonic aircraft can fly into outer space, whereas space vehicles and satellites must necessarily pass through air space. Moreover, multi-purpose vehicles are being developed by the United States and Russia.

In order to deal with this unresolved subject, the opening portions of the chapter present a historical review of the main theories governing air law. Next, Andem analyzes the evolution of the United Nations' concept of freedom of outer space. Necessarily, the major issues to arise center on the exploration of outer space. Proposals for joint undertakings between the United States and Russia, along with other industrialized states, are currently being considered. Dr. Andem argues that comprehensive solutions are sought in order to create a zone of peace in outer space.

From this premise, Chapter Five delves into the above mentioned issues, particularly by discussing the Bogota Declaration[13] in relation to the geostationary orbit. A valuable survey of the viewpoints offered by states, international organizations and scholars are reexamined in order to determine the limits of outer space and its future potential. Once again Dr. Andem returns to one of his categorical imperatives when he argues that the "exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of mankind. . . ."[14] Underlying this theme is the norm of non-appropriation, as embodied in the Space Treaty.

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10. *Id.* at 62-64.

11. *See* Treaty, *supra* note 5.

12. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295. *See* I.H. PH. DIEDERIKS-VERSCHOOR, AIR LAW (3ed. 1988).

13. ITU, Broadcasting Satellite Conference, Doc. No. 81-E, Annex 4 (Jan. 17, 1977). *See also,* CARL Q. CHRISTOL, THE MODERN INTERNATIONAL LAW OF SPACE 466-69, 514-31 (1982); OUTER SPACE, *supra* note 1, at 159 ff.

14. OUTER SPACE, *supra* note 1, at 177.

Chapter Six deals with the demilitarization of outer space, the moon and other celestial bodies. In support of his premise that the common interests of mankind will hopefully guide the conquest of the universe, Dr. Andem presents a detailed analysis of germane United Nations treaty articles and views of jurisconsults. The immediate goal is broader participation of states in applications of space sciences such as remote sensing of earth resources, protection of the environment, meteorology, space medicine, and joint projects (i.e. the construction of solar transportation systems and space stations).

With Chapter Seven, the focus shifts toward the primary application of space technology. Specifically, the final three substantive chapters (seven through nine) deal with earth based satellites, the use of communication satellites and technology in space, and the resulting corpus of law. Beyond question, the employment of communication satellites continues to be one of the most important aspects of this newer division of communications law, which has evolved from the regulation of air waves. Space communication is a field within a larger entity (i.e. space law), however, that acts concurrently with other categories of international law. For example, the employment of artificial earth satellites has necessitated a network of agreements, the creation of major international satellite systems (INTELSAT, INTERSPUTNIK and IMARSAT), and proposals seeking an umbrella international agency within the structure of the United Nations. Incorporated within the scope of these umbrella institutions, national and regional satellite systems have been perfected for the benefit of maritime and aeronautical sensing. In excess of one hundred and twenty countries have cooperated in these regional and world-wide ventures. The success of the Indian satellite instructional television experiment, based on an agreement between the United States and India is one example. Additional examples from Africa and the Andean sub-region illustrate the extensive scope of national and regional satellite undertakings.

Numerous legal questions arise from direct television and radio broadcasting, owing to ITU regulations imposing some limitations on states and private parties. Steps have been taken to regulate broadcasts by the United Nations General Assembly under the provisions of Resolution 37/92 of 10 December 1982, which carries the text of the *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.*[15] These principles are in fact guidelines that may in the future be implemented by the ITU. Professor Andem concludes that these IDTBS principles will contribute to the promotion and strengthening of mutual understanding by facilitating the free flow of information through the exchange of scientific and educational ventures.

The underlying theme of international cooperation is carried forward into Chapter Eight, Satellite Meteorology, an area of particular impor-

15. *Id.* at 280 n.93, citing U.N. Doc. A/RES/37/92 (4 Feb. 1983).

tance especially to the developing world. States have cooperated and refrained from imposing defenses of sovereignty in the field of weather forecasting, as evidenced from the high level of cooperation between the United States and the USSR in the early days of satellite monitoring. With the perfection of satellite technology, it became possible to predict impending atmospheric changes. Hence, advanced warning made it possible for regions, states and individuals to take preventive measures. As a result, damage from severe storms and hurricanes could be reduced. Advanced warning are especially helpful to developing countries, which possess limited resources to deal with the aftermaths of natural catastrophes.

Numerous programs of WHO are examined (World Weather Watch (WWWP) and the Tropical Cyclone Programme (TCP), along with related efforts by other U.N. and multinational organs (e.g. UNESCO, ICAO, ITU and ESA). These numerous organizations have perfected an effective system for the utilization of space technology. The primary examples cited in the book involve NOAA of the United States, METEOR of the Russian Republic, INSTAT of India and GMS of Japan. Other national satellites, along with METEOSAT (of EUMETSAT) form portions of this global meteorological structure. Dr. Andem proposes the existing meteorological satellite system be improved, rather than attempting to create additional regional organs.

The message emerging from this chapter (and similarly from the three chapters dealing with space satellites) is that this area has achieved the highest level of multinational cooperation and coordination. Valuable political and legal precedent has been created that can be employed in the future when bolder attempts are made to establish a functional order for both inner and outer space. Here then is guidance not only for states, but likewise for COPUOS.

Although sensing by meteorological satellites is one of the oldest and most successful applications of space science, one of the newer fields - and presently the most controversial - is the sensing of earth resources. Interestingly, considerable overlapping and concurrent jurisdiction exists between meteorological and resource sensing. The author observes these systems are complementary. In fact, he concludes that at some point other systems will overlap with remote sensing.

Ever present throughout Dr. Andem's discussion is the partially resolved, though potentially dangerous, clash between state sovereignty and the unrestricted use of space. Non space powers, especially developing countries, strongly oppose the remote sensing of their territories (i.e. land masses and territorial seas) because the acquisition of such data places the sensed state at a distinct disadvantage. A defense of sovereignty is imposed without success since the norm of freedom of outer space predominates. Against this background, Dr. Andem supports the free dissemination of sensed data and refined information. However, he seeks solutions that will protect the poorer and less industrialized states by means of cooperation within a United Nations framework that incorporates the participation of specialized agencies. That is, the concept of the

free dissemination of data must be applied in such a fashion as to protect the privacy and confidentiality of sensed states and regions.

Following a review of earlier conventions,[16] Dr. Andem bases his position to a considerable degree on the *Principles Relating to Remote Sensing of the Earth From Space*,[17] which are the result of fifteen years of sustained study and negotiation by COPUOS. Dr. Andem implies these fifteen principles can serve as the basis for future action, as for example in the area of peaceful settlement of disputes.[18]

The author's detailed analysis serves as the groundwork for his final conclusions. As was typical of the preceding chapters, he has the ability to select those international and regional instruments that are contributing to the evolution of a complete corpus of international space law. Consistently, current (and historical) accomplishments are employed as stepping-stones to ultimate objectives, the main one being the perfection of a new "specialized international agency similar to the International Atomic Energy Agency (IAEA) of the World Meteorological Organization (WMO) to coordinate and monitor all remote sensing activities."[19] This new specialized agency would be responsible for dealing with, and possibly disseminating, data and information received from remote sensing, and also strive toward the eventual unification of existing remote sensing programs and projects.

Recommendations are offered in an effort to firmly base this new corpus of international space law in reality. One major step will be a more aggressive and far-reaching approach by COPUOS and its two sub-committees (the "Scientific and Technical" and "Legal") in the search for new solutions. Their prior record, as demonstrated in the book, is outstanding. Not only has COPUOS achieved considerable success during the prior decade in developing space science and law, it has also served as a model for organizations dealing with other rubrics of law.

Concerning the future status of the geostationary orbit, including radio frequencies, Dr. Andem proposes that satellite operators comply with the provisions of the ITU Convention and the Final Acts of the World Administrative Conferences. Within this context he recommends that new systems be established within the orbit on a regional and global basis, with the participation of all states.

Recommendations such as the verification of disarmament measures are set forth, and as could have been anticipated from the underlying theme of the implementation of environmental protection throughout the

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16. Convention on the Transfer and Use of Data of Remote Sensing of the Earth From Outer Space, U.N. Doc. A/33/162 (June 21, 1978); discussed in MORRIS D. FORKOSCH, OUTER SPACE AND LEGAL LIABILITY 184-85 (1982); W. Paul Gormley, *Outer Space and Legal Liability*, 10 BROOKLYN J. INT'L L. 581 (1984) (book review).

17. For a discussion of the draft articles, *see* OUTER SPACE, *supra* note 1, at 387-401 (and the sources cited).

18. *See, e.g., id.* at 400-01.

19. *Id.* at 402-03.

book, recommendations are advanced that are designed to protect the earth's fragile ecology.

Dr. Andem's final thoughts are directed toward future regimes, as mankind seeks to utilize the resources of the universe. Central to his proposals is the increasing position of the United Nations, "as the center of international cooperation and for codification and progressive development of contemporary international law."[20] As a counterpart, COPUOS will periodically review the effectiveness of existing outer space conventions in attempting to achieve the final regime for peaceful purposes that have been advanced throughout this excellent study.[21]

20. *Id.* at 426.

21. Manfred Lachs, Preface, *id.* at x (footnote omitted). Lachs concludes, "This impact of scientific and technological progress has also led to some radical changes in the classical concepts and theories in contemporary international law and international relations."

BOOK NOTES

THE INTERNATIONAL POLITICS OF THE ENVIRONMENT; Edited by Andrew Hurrell and Benedict Kingsbury; Clarendon Press; New York (1992); ISBN 0-19-827778-4; 492 pp. (hardcover).

This book contains sixteen essays analyzing the relationship of particular issues, institutions, and aspects of the international arena to global environmental problems. In their introductory overview, Hurrell and Kingsbury identify the common issue addressed by each essay: whether a highly fragmented political system consisting of over 170 sovereign states, and numerous actors, can achieve the high levels of cooperation necessary to manage environmental problems on a global scale. A nuts and bolts discussion of the strengths and weaknesses of the existing international community and its ability to address current transnational environmental concerns follows.

The book is divided into several sections: Standard Setting and Implementation, Institutions, and Power and Conflict of Interest. Two of the essays in the Standard Setting and Implementation section, by Birnie and Richardson, provide an analysis of existing international law and mechanisms for rule promulgation, implementation and enforcement. Notable for its insight is a chapter by List and Rittenberger analyzing international regimes (institutions created by the collective action of states to limit individual states' actions in certain areas in efforts of overcoming environmental problems.) Further chapters in this section address the role of non-governmental organizations in relation to oceanic environmental problems, different approaches and limitations of the negotiation of international agreements, and the cooperative problems posed by global warming.

The second section, Institutions, discusses the United Nations, the World Bank and the European Community in separate essays. Thatcher's discussion of the U.N. charts its development of environmental concerns, including the emergence of the concept of sustainable development and the problems of funding assistance programs. Piddington provides an overview of the World Bank and its treatment of environmental concerns, including its influence on environmental goals through economic policy. Finally, Haigh traces the development of the European Community's in-

ternal and external environmental policies, concluding that the Member States must take practical actions to achieve environmental goals.

The final section, Power and Conflicts of Interest, turns the focus of the analysis to several specific environmental issues and state policies. State discussions include essays on the deficiencies of Japan's global economic policies and U.S. policy on climate change. Other issues range from deforestration to the distribution of power in the international community.

Attention to detail is evident throughout the text, resulting in a comprehensive discussion of the economics and politics of global environmental problems. By analyzing specific and sometimes seemingly unrelated aspects of this topic, the book, as a whole, provides a unified and comprehensive view of the international community's current position on global environmental concerns.

William G. Klain

INTERNATIONAL LAW OF EXPORT CONTROL-JURISDICTIONAL ISSUES; Edited by Karl M. Meesen; Graham & Trotman/Martinus Nijhoff; London, England (1992); ISBN 1-85333-483-9 (hardcover).

The Queensland Conference of the International Law Association, held in August, 1990, has generated the publication of a volume on the jurisdictional issues involved in the international law of export controls.

The book does not represent a comprehensive study of the law of export controls. Rather, it is a series of reports prepared by members of the International Law Association International Committee on the "Legal Aspects of Extraterritorial Jurisdiction." The reports, initially submitted to the Committee, were edited and brought together by Professor Karl Meesen, the Committee's Rapporteur.

Professor Meesen also wrote the helpful General Report which preceeds the different national reports. The General Report describes the incidents, in 1982 and 1984, that highlighted the dimension of jurisdictional disputes arising out of export control laws. For example, the pipeline dispute of 1982 involved the United States' prohibition on the sale of pipeline equipment to the former Soviet Union, especially from European subsidiaries of American companies. With the support of their European hosts, American subsidiaries refused to obey the prohibition and continued to sell pipeline equipment to the former Soviet Union. The U.S. blacklisted these companies for several months before retracting the prohibition. Meesen theorizes that export control laws give rise to such situations.

Ten national reports follow the General Report, each focusing on a particular country's export control laws. The ten nations are Argentina, Austria, Canada,the European Economic Community, France, Germany, Italy, the Netherlands, the United Kingdom and the United States. Of special interest is the report by Francesco Francioni and Andreas Bianchi

on Italy. Italian export control laws are currently in the process of being completely rewritten by the Italian legislature. The approach taken in the writing of the new laws is almost opposite to the spirit behind the old 1956 laws. The best example of this radical change lies in the principle of freedom of commerce (i.e., of export) passed in a law of 1988 after 30 years of a 1956 law based on the denial of freedom of commerce (every export had to be approved by the Italian Ministry of Foreign Commerce). The article describes the old rules but carefully includes the new ones as well, thus providing a comprehensive look at the Italian export control legal system.

Another national report, written by Oskar Weiss-Tessbach and Franz J. Heidinger about Austria is especially interesting. Austria's main concern in export control legislation lies in the export of technology to certain nations and the export of its cultural heritage. Because the 1918 law covering these areas continues to function well, the authors decided to focus on the new 1988 laws forbidding the export of technology to certain nations. The Austrian system appears both free and responsible, allowing for no restrictions in exports of technology except for certain goods listed in the 1988 Act passed by the Austrian legislature.

One of the major critiques of the book is that the reports mainly concern Europe and the United States. Neither Asia, a major business partner of both the U.S. and Europe, nor South America (except for Argentina) or the African continent, are the subjects of reports. Although, as its Foreword made clear, this book never intended to represent a comprehensive study of international export control laws, the limited geographical area covered by its reports renders the book of limited interest.

Geraldine Cummins

WATSON, ADAM, THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE HISTORICAL ANALYSIS; Routledge, New York, NY (1992); ISBN 0415 06998 X; 337 pp. (softcover).

Adam Watson has been a British Ambassador and Assistant Under-Secretary of State, Chairman of the British Committee for the theory of International Politics and, since 1978, Professor of International Relations at the University of Virginia. In order to appreciate the system of international order present today, Watson believes in the importance of understanding previous systems in history. The Evolution of International Society: A Comparative Historical Analysis attempts to further this understanding through a methodical historical analysis of international societies. The book begins with a discussion of the systems of ancient states, and then moves to the two distinct Asian systems in India and China. After developing a historical understanding of these systems, Watson explains the European systems and concludes with a discussion of contemporary systems of international society. At the outset, the author does poses tow important questions, which he discusses throughout the text: one is the idea of cultural unity in each of the systems, and the other

of hegemonical and imperial authority.

The discussion of the ancient systems begins with the Kingdom of Sumer, the nation with the earliest written records. An analysis of Assyria, Persia, Classical Greece, and the Macedonian systems continues the discussion of the ancient systems. Watson creates the cultural and political framework to analyze each of these societies. The book then shifts to the Indian system of societies that developed as multiple, independent unities with a diversity of peoples, and a variety of languages present even today. The Indian systems are contrasted with the Chinese system, which developed in isolation, but later became multiple independent systems. The author easily shifts his discussion of Asia globally by next analyzing the Roman and Byzantine systems. He concludes his discussion of the ancient systems with a look at Islam.

The author's discussion of European systems is limited to those which have influenced our present system. Beginning with Medieval society, where later European states are rooted, the book expands into the Renaissance. He discusses the spread of the Italian Renaissance throughout Europe in the sixteenth century and its influence on the evolution of contemporary systems.

The next section explores three aspects of sixteenth century struggles to replace the Renaissance and Reformation with a new organization in Europe. The first struggle is the Reformation, the second is the consolidation of the independent states, and the final struggle is the establishment of the hegemonical authority and a move towards the imperial end of the spectrum. Watson proceeds into the seventeenth century, which featured the settlement in Westphalia after the Thirty Years War. The settlement, according to the author, began "the age of reason and balance," leading into European expansion prior to the nineteenth century.

This propels the reader into the final leg of Watson's journey with a look at the contemporary system of states. In the last few pages of the book, the author provides a brief account of two major phases in the emergence of the global international society: first, the two decades between the wars and the collapse of European domination, and second, the four decades following the Second World War — the age of the superpowers and decolonization. Watson covers this extensive amount of material in a methodical and informative manner, giving the reader a firm background in the history of international state systems. His historical accounts are detail specific, and his method of comparisons enlightening.

Manisha Davé